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United States

1318

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT, and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

VOLUME I.

(Pages 1 to 292, Inclusive.)

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Southern Division.

FILED

AUG 10 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit for Injunction	78
Affidavit of R. T. Harding on Service of Citation on Appeal.....	546
Affidavit of Walter B. Maling, on Defendants' Exceptions and Objections to the Fourth and Final Account and Report of Receiver, and all Prior Accounts and Reports.....	493
Affidavit of W. S. Noyes in Reply to Supplemental Affidavits of Plaintiffs.....	39
Affidavit of Capt. W. S. Overton Dated July 26, 1915	5
Affidavit of Capt. W. S. Overton Dated July 27, 1915	9
Affidavit of Captain W. S. Overton Dated October 6, 1915.....	12
Affidavit of W. S. Overton in Support of Motion	69
Answer of B. S. Noyes to Supplemental Affidavit in Support of Application for Temporary Injunction	56
Assignment of Errors on Appeal from "Order Confirming Fourth and Final Report and	

Index.	Page
Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," and from Memorandum Opinion.	522
Auxiliary Order for Receiver to Deliver Property to Defendant, Presidio Mining Company	336
Certificate of Clerk U. S. District Court to Transcript of Record.....	549
Citation on Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Made, Entered and Filed in the Above-entitled Cause and Court on September 29, 1921..	550
Complainants' Answer to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver.....	431
Complainants' Praecipe on Defendants' Appeal from Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney	543
Cost Bond on Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Made, Entered and Filed in Said Cause and Court on September 29, 1921.....	533
Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver	356

Index. Page

Defendants' Objections to Receiver's Second Report	289
Defendants' Praeceptum on Appeal from Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney	535

EXHIBITS:

Exhibit "A" Attached to Affidavit of W. S. Noyes in Reply to Supplemental Affidavits of Plaintiffs—Report of Apportionment of Bullion Yield for November, 1915	54
Exhibit "A" Attached to Affidavit of W. S. Overton for Injunction—Voting Trust Dated July 7, 1914.....	85
Exhibit "B" Attached to Affidavit of W. S. Overton for Injunction—Correspondence Between R. F. Harding and W. F. Rose and Klink, Bean & Company....	88
Exhibit "C" Attached to Affidavit of W. S. Overton for Injunction—Report Dated October 14, 1916, Klink, Bean & Company to Board of Directors of Presidio Mining Company	90
Exhibit "A" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated July 29, 1918, W. B. Maling to W. F. Rose.....	443

EXHIBITS—Continued:

- Exhibit "B" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated July 31, 1918, Wm. F. Rose to Walter B. Maling.. 444
- Exhibit "C" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated August 24, 1918, Wm. F. Rose to Walter B. Maling.... 445
- Exhibit "D" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated September 2, 1918, Wm. S. Noyes to Walter B. Maling 446
- Exhibit "E" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated September 12, 1919, Wm. S. Noyes to Walter B. Maling 447
- Exhibit "F" Attached to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver—Letter Dated September 21, 1919, F. C. Handy to Walter B. Maling 451
- Exhibit "G" Attached to Defendants' Exceptions and Objections to Fourth and

EXHIBITS—Continued:

Final Report and Account of Receiver—Testimony in Trial Court— W. S. Noyes	455
Exhibit “H” Attached to Defendants’ Exceptions and Objections to Fourth and Final Report and Account of Receiver—Testimony of W. S. Noyes (Cross-examination)	462
Exhibit “I” Attached to Defendants’ Exceptions and Objections to Fourth and Final Report and Account of Receiver—Testimony in Trial Court— W. S. Noyes (Cross-examination)....	478
Exhibit “J” Attached to Defendants’ Exceptions and Objections to Fourth and Final Report and Account of Receiver—Unsigned Letter Dated February 15, 1919, to W. F. Rose.....	482
Exhibit “A” Attached to Report of Auditor, Dated October 2, 1919—General Balance Sheet—1906–1913, 1914–1917	200
Exhibit “B” Attached to Report of Auditor, Dated October 2, 1919—Statement of Income and Profit and Loss—1906–1917	201
Exhibit “C” Attached to Report of Auditor, Dated October 2, 1919—Statement of Payments Made to E. G. Gleim Company—1906–1917	202

	Index.	Page
EXHIBITS—Continued:		
Exhibit “A” Attached to Report of Auditor, Dated October 2, 1919—General Balance Sheet—1918, 1917..		207
Exhibit “B” Attached to Report of Auditor, Dated October 2, 1919—Statement of Income and Profit and Loss—1918, 1917		208
Exhibit “A” Attached to First Report of Receiver—Inventory of Real Estate, etc., Belonging to Presidio Mining Company, and Taken Over by Walter B. Maling, Receiver, March 7, 1918...		234
Exhibit “B” Attached to First Report of Receiver—Inventory of Real Estate, etc., Belonging to Presidio Mining Company, October 1, 1918.....		245
Exhibit “C” Attached to First Report of Receiver—List of Employees of Presidio Mining Company Dated October 10, 1918		257
Exhibit “A” Attached to Fourth and Final Report and Account of Receiver—Auxiliary Order for Receiver to Deliver Property to Defendant, Presidio Mining Company		336
Exhibit “B” Attached to Fourth and Final Report and Account of Receiver—Receipt of Certain Property from Walter B. Maling, Dated May 6, 1921		338

EXHIBITS—Continued:

Exhibit "C" Attached to Fourth and Final Report and Account of Receiver—Receipt from Walter B. Maling of Silver Bullion, Dated May 17, 1921	341
Exhibit "D" Attached to Fourth and Final Report and Account of Receiver—Acknowledgment of Receipt from Walter B. Maling by E. M. Gleim, Dated May 11, 1921.....	341
Exhibit "E" Attached to Fourth and Final Report and Account of Receiver—Assumption of Payment of Bills Owing by Receiver by E. M. Gleim, Dated May 11, 1921.....	342
Exhibit "F" Attached to Fourth and Final Report and Account of Receiver—Receipt of Certain Moneys and Deposits from Walter B. Maling, Dated May 11, 1921	342
Exhibit "G" Attached to Fourth and Final Report and Account of Receiver—Inventory of Real Estate, etc., Belonging to Presidio Mining Company, Turned Over to E. M. Gleim on May 11, 1921	344
Exhibit "A" Attached to Supplemental Account of Walter B. Maling, Formerly Receiver Herein, Showing Disposition of Money on Hand at Date of	

	Index.	Page
EXHIBITS—Continued:		
Decree of Discharge on the 29th Day of September, 1921, Including Trial Balance for Period Ending on That Date—Trial Balance Sheet of Presidio Mining Company for Period Ending September 29, 1921.....		509
Exhibit "A" Attached to Supplemental Affidavit of Frank H. Gardiner in Support of Application for Temporary Injunction—Excerpts from Minute-book of Board of Directors of the Presidio Mining Company, Dated January 29, 1913		34
Exhibit "A" Attached to Supplemental Affidavit of W. S. Overton in Support of Application for Temporary Injunction—Excerpts from Minute-book of Board of Directors of the Presidio Mining Company, Dated January 29, 1913		24
Exhibit "B" Attached to Supplemental Affidavit of W. S. Overton in Support of Application for Temporary Injunction—Letter Dated October 27, 1915, W. S. Overton to Presidio Mining Company		26
Exhibit "C" Attached to Supplemental Affidavit of W. S. Overton in Support of Application for Temporary Injunction—Letter Dated October 30, 1915,		

EXHIBITS—Continued:

W. S. Overton to Presidio Mining Company	29
Exhibit "D" Attached to Supplemental Affidavit of W. S. Overton in Support of Application for Temporary Injunction—Letter Dated November 2, 1915, W. S. Overton to Presidio Mining Company	30
First Report of Receiver.....	209
Fourth and Final Report and Account of Receiver	316
Injunction Pendente Lite.....	102
Mandate	512
Master's Report on Accounting	105
Memorandum Opinion	501
Motion for Injunction Pendente Lite.....	76
Motion for Temporary Injunction.....	1
Motion to Appoint Temporary Receiver.....	3
Motion to Produce Documents and for Order of Inspection	66
Names and Addresses of Attorneys.....	1
Notice of Filing Receiver's Account.....	275
Objections of Defendants to the Allowance of and to Settlement of Receiver's Account..	312
Order Allowing Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Made,, Entered and Filed in the Above-entitled	

Index.	Page
Cause and Court on September 29, 1921, and Fixing Amount of Bond.....	532
Order Authorizing Receiver to Deliver Prop- erty to Defendant Presidio Mining Com- pany	517
Order Confirming Fourth and Final Report and Account of Receiver and Allowing Compensation to Said Receiver and His Attorney	504
Order Confirming Second Report and Account of Receiver and Allowing Compensation to Said Receiver and His Attorney.....	294
Order Confirming Third Report and Account of Receiver and Allowing Compensation to Said Receiver and His Attorney.....	314
Order Denying Application for the Appoint- ment of Receiver, Without Prejudice, etc..	65
Order Directing Mandate to be Spread on Minutes	512
Order Enlarging Time to and Including August 26, 1922, to File Record and Docket Cause.	557
Order Permitting Receiver to Appoint Auditor.	181
Order Permitting Receiver to Invest Surplus Funds in His Hands in the New (Third) Liberty Loan	173
Order Permitting Receiver to Purchase New Engine at Mine.....	178
Order to Produce and Allow Inspection of Documents	74
Order to Show Cause and Temporary Restrain- ing Order	97

Index. Page

Petition for Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Given and Made in Said Cause and Court on September 29, 1921, by Honorable Wm. C. Van Fleet, Judge Thereof, and Filed in Said Cause and Court and With the Clerk of Said Court on Said September 29, 1921.	520
Petition for Appointment of Auditor.....	180
Petition for Permission to Purchase New Engine at Mine	176
Receiver's Bond	169
Report of Auditors, Dated October 2, 1919....	203
Report of Auditors, Dated October 3, 1919....	182
Return on Service of Writ.....	104
Second Report of Receiver.....	276
Stipulation Agreeing upon Receiver.....	168
Stipulation Allowing Fees of Receiver and His Attorney	262
Stipulation and Order Enlarging Time to File Transcript of Record on Appeal and to Docket Said Cause in the Matter of the Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Given and Made in Said Cause on September 29, 1921, Which Said Cause is No. 196 in Equity, in the Southern Division of the United States Dis-	

Index.	Page
trict Court of the Northern District of California, Southern Division	541
Stipulation and Order Extending Time to and Including June 26, 1922, to File Record and Docket Cause	555
Stipulation as to Printing of Record on Appeal (Copy)	539
Stipulation as to Printing of Record on Appeal (Original)	553
Stipulation Inviting Judge to Visit Mine.....	273
Supplemental Account of Walter B. Maling, Formerly Receiver Herein, Showing Disposition of Money on Hand at Date of Decree of Discharge on the 29th Day of September, 1921, Including Trial Balance for Period Ending on That Date.....	507
Supplemental Affidavit of Frank H. Gardiner in Support of Application for Temporary Injunction	32
Supplemental Affidavit of E. A. Herger in Support of Application for Temporary Injunction	36
Supplemental Affidavit of W. S. Overton in Support of Application for Temporary Injunction	15
Supplemental Report	166
Supplement to First Report of Receiver.....	265
Third Report of Receiver.....	296
Undertaking on Injunction Pendente Lite....	100
Undertaking on Order to Show Cause and Temporary Restraining Order.....	95

Names and Addresses of Attorneys.

R. T. HARDING, Esq., and HENRY E. MON-
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and J. J. DUNNE, Esq., Mills Bldg., San Fran-
cisco, Calif.,

Attorneys for Defendants and Appellants.

WILLIAM F. ROSE, Esq., 614 Mills Building,
San Francisco, Calif.,

Attorney for Complainants and Appel-
lees.

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Motion for Temporary Injunction.

To the Honorable the Judge of the District Court
of the United States, in and for the Northern
District of California, Second Division:

Now come W. S. Overton and Carl A. Martin,

the complainants in the above-entitled suit, by William F. Rose and Bruce Glidden, complainants, solicitors and move the Honorable Court to grant a writ of injunction against defendants and each of them, their agents, attorneys, clerks, servants and employees, pending this suit, and until the further order of this Court, conformable to the prayer of the amended bill of said case filed, and based on this motion and notice thereof, and on said amended bill, the affidavits of W. S. Overton dated July 26th, 1915, July 27th, 1915, and of even date herewith and also on all the records, files and pleadings in this suit and on oral and documentary evidence.

Dated October 5, 1915.

WM. F. ROSE and
BRUCE GLIDDEN,
Solicitors for Complainants.
CHARLES CLYDE SPICER,
Of Counsel.

Copy of within motion received this 6th day of October, 1915.

R. T. HARDING and
HENRY E. MONROE,
Solicitors for Defendants.

[Endorsed]: Filed Oct. 7, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Northern District of California,
Second Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Motion to Appoint Temporary Receiver.

To the Honorable the Judge of the District Court
of the United States, in and for the Northern
District of California, Second Division:

Now come W. S. Overton and Carl A. Martin, the
complainants in the above-entitled suit, by William
F. Rose and Bruce Glidden, complainants' solici-
tors and move the Honorable Court to grant and
appoint a temporary receiver herein pending this
suit and until the further order of this Court and
to take charge of the affairs of the said defendant
corporation, Presidio Mining Company, conform-
able to the prayer of said amended bill, and based
on this motion and notice thereof and on said
amended bill, the affidavits of W. S. Overton,
dated July 26th and 27th, 1915, respectively and
of even date herewith, and on all the records, files

and pleadings in this suit, and on oral and documentary evidence.

Dated October 5, 1915.

WM. F. ROSE and
BRUCE GLIDDEN,
Solicitors for Complainants.

CHARLES CLYDE SPICER,
Of Counsel.

Copy of within motion received this 6th day of
October, 1915.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Defendants.

[Endorsed]: Filed Oct. 7, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

W. S. OVERTON and CARL A. MARTIN, on
Behalf of Themselves and Other Minority
Stockholders of the PRESIDIO MINING
COMPANY Named in This Complaint,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,
Defendants.

Affidavit of Capt. W. S. Overton.

State of California,

City and County of San Francisco,—ss.

Capt. W. S. Overton, being first duly sworn, on his oath, deposes and says: That he is one of the minority stockholders of the Presidio Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, which owns Section 8, comprising approximately 640 acres which said tract adjoins Survey No. 5 in Block No. 8 of Survey made for the Houston & Texas Central Railway Company, the same being situate in the County of Presidio, State of Texas; that he has examined the books of the San Francisco office of said Company and finds that ever since the execution of that certain resolution dated February 15, 1913, wherein and whereby Wm. S. Noyes caused the Board of Directors of said Company to vote him a bonus of \$45,000.00 for securing the execution of said Exhibit "B" to said Presidio Mining Company, that said Wm. S. Noyes has [3] systematically drained the treasury of said Company of all funds over and above the payment of salaries to the various officers of the Company, to pay himself the said bonus of \$45,000.00 and that this affiant firmly believes that he will continue to drain the Company of all moneys coming in from the sale of bullion over and above the payment of expenses at the mine and the payment of salaries to the officers at San Francisco, to

apply on his alleged claim of some \$43,000.00 which he claims to be due him from the contract attached to the complaint herein and marked Exhibit "C"; that affiant examined the books at the San Francisco office on Saturday, July 24, 1915, and found the cash on hand to be \$1252.31, and that there was bullion at the Selby Smelter, at Selby, California, of the value of \$9414.13; that it is the firm belief of affiant that said Wm. S. Noyes will, after deducting the actual operating expenses, pay to himself all of the remainder; that in support of said belief, affiant furnishes the following statement taken by him from the books of the Presidio Mining Company, showing the following sums to have been paid to Wm. S. Noyes, to wit:

1913

Feb. 27	Cash	\$11,000.
Mar. 18	Cash	5,000.
May 15	Cash	1,000.
Sept. 6	Cash	3,500.
Oct. 1	Cash	3,000.
Oct. 21	Cash	1,000.
Oct. 11	Cash	469.50
Dec. 29	Cash	3,485.90

1914

Jan. 2	Cash	1,500.
Mar. 7	Cash	1,000.
July 3	Cash	1,000.
Sept. 26	Cash	734.50

1915

Feb. 5	Cash	190.
Mar. 10	Cash	2,000.
May 6	Cash	3,786.20
June 28	Cash	5,035.20

Total (excepting salary)...\$43,701.30

[4]

Total amount claimed by Noyes, Feb. 15,
1913, to June 1, 1915, for bonus, and
ownership Section 5.....\$87,475.80

July 20, 1915, Secretary shows by ledger
we owe Noyes on June 1, 1915.....\$43,774.50

The above sums are exclusive of and in addition
to the salary paid to Wm. S. Noyes of \$450.00 per
month, or \$5400.00 per year.

That this affiant firmly believes that unless the
said Wm. S. Noyes and the directors and officers
of said Company are restrained by order of this
Court, that they will immediately make way with
and pay to themselves all moneys now on hand and
all moneys derived from the bullion at the Selby
Smelter, as aforesaid; and, further, that said Wm.
S. Noyes and said directors and officers of said
Company will further squander and dissipate the
assets of said corporation so as to seriously embar-
rass said corporation and plunge the same further
into debt, and that the said Wm. S. Noyes, unless
restrained by the order of this Court, will dispose
of Section 5 referred to and described in the Bill of
Complaint herein; and, further, that said directors
and officers of said Company will, unless restrained
by order of this Court, dispose of and place beyond
the reach of this action, the stock held by them

individually, and as Trustees, in the Presidio Mining Company; and, affiant further says that he firmly believes that unless this Court takes immediate possession of the books and records of said corporation, that said directors and officers of said Company will alter, deface, destroy or make way with the same. And further, affiant saith not.

CAPT. W. S. OVERTON.

Subscribed and sworn to before me this 26th day of July, A. D. 1915.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 28, 1915. Walter B. Maling, Clerk. [5]

In the District Court of the United States, in and for the Northern District of California, Second Division.

W. S. OVERTON and CARL A. MARTIN, on
Behalf of Themselves and Other Minority
Stockholders of the PRESIDIO MINING
COMPANY Named in This Complaint,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Affidavit of Capt. W. S. Overton.

United States of America,
City and County of San Francisco,
State of California,—ss.

W. S. Overton, being first duly sworn, on oath, deposes and says: That he makes this his supplemental affidavit as to matters discovered about 4:30 P. M. on the 26th day of July, 1915, and since filing the complaint in this action; deponent says that on the 20th day of July, 1915, he went to the Secretary of the Presidio Mining Company, to wit, Mr. L. Osborn, at #255 California Street, Room #204, which is the office of the Company, and asked said Osborn for a full and complete statement of the moneys paid to Wm. S. Noyes on account of the bonus which had been voted to said Noyes for securing a year's lease on "Section 5," otherwise known as Survey No. 5, in Block 8, of the Houston & Texas Central Railway Company's survey in Presidio County, Texas; and, on account of the contract dated the 19th day of November, 1913, between Wm. S. Noyes and the Presidio Mining Company, whereby the year's lease for which he had received a \$45,000.00 bonus, was cancelled and a new contract entered into whereby the Presidio Mining [6] Company was to mine and mill the ore and pay to Noyes one-half of the net profit plus \$1.00 per ton and was given, at that time, by said Osborn the following statement, to wit: That Noyes had been paid exclusive and in

addition to all salary, from the 27th day of February, 1913, to the 28th day of June, 1915, inclusive, the total sum of \$43,701.30 as set forth in detail in affiant's previous affidavit. Said Osborn also advised affiant that the total amount claimed by said Noyes on account of said bonus and said contract, was \$87,475.80; that affiant did not, at that time, think to ask said Osborn what the amount of cash on hand was, but that on the 24th day of July, 1915, he went to the office of the Company and asked said Osborn what the total amount of the cash balance was and was informed that it was \$1252.31; that affiant went to the office of said Company at 4:30 P. M. on this day to inquire as to what disposition had been made of the bullion at the Selby Smelter and the money therefrom, whereupon the following conversation took place between affiant and said Osborn:

“Overton: Has Noyes got that Smelter money in his pocket yet? Let me know when he gets it.

Osborn: No, it hasn't come yet.

Overton: He hasn't received any yet, then?

Osborn: Yes, he got \$6000.00 just after you left a few days ago; I don't remember just what it was.”

This conversation occurred on California Street a short distance from the office, whereupon affiant said: “I want to see the exact amount that was paid to Noyes,” whereupon affiant and Osborn repaired to the office of the Company where Osborn showed affiant the stub of the check-book which showed that

on July 20th, the very day that statement was furnished to affiant showing the total sums of money paid to Noyes, there had been paid to Noyes the [7] additional sum of \$6075.05 on account of the personal demands and claims of said Wm. S. Noyes against said corporation. This makes a total of \$49,776.35 which has been paid to Wm. S. Noyes and also makes a total of \$11,110.25 which has been paid to him within the last 30 days, and the \$1252.00 which is shown as cash on hand is probably reserved as a little more than enough to pay the current salaries of the officers of the San Francisco office.

WHEREFORE, affiant reiterates his firm belief that if the receipts from the bullion at the Selby Smelter are allowed to come into the hands of the officers of the Company, they will be immediately seized and taken by Wm. S. Noyes.

Affiant wishes further to state that this payment has been made since a day about one week ago when L. Osborn, the Secretary of the Company, told affiant that the Company was "bankrupt."

And further, affiant saith not.

W. S. OVERTON.

Subscribed and sworn to before me this 27th day of July, 1915.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 28, 1915. Walter B. Maling, Clerk. [8]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON, and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Affidavit of Capt. W. S. Overton.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. S. Overton, being first duly sworn, on oath,
deposes and says: That he is one of the complain-
ants in the above-entitled suit. That since the
filing of the last affidavit made by him, he has
discovered the following facts:

That on or about August 1, 1915, said Presidio
Mining Company, instead of having any funds in
its Treasury had an overdraft of \$3024.98. That
notwithstanding the condition of said Company's
Treasury, said Wm. S. Noyes, on or about Septem-
ber 18, 1915, drew from the Company \$5819.15,
alleged to be due him for ore purchases for the
month of March, 1914, and claimed by him under

and by virtue of that certain resolution dated November 19, 1913, mentioned on page 12 of the amended bill of complaint filed herein. That on or about September 25th, 1915, the officers of said Presidio Mining Company drew a total sum of \$770 as salaries for said month.

That said Wm. S. Noyes has also drawn the following [9] sums of money as advance interest on money loaned by him to the corporation, and during the period of time when he was drawing large sums from the company on ore purchase accounts and while drawing a large salary for managing its business, to wit:

Jan. 27—1914	Interest in advance.....	\$400
May —1914	” ” ”	100
Aug. 17—1914	” ” ”	200
Mch. 4—1915	” ” ”	200
		<hr/>
Total.....		\$900

That said corporation has paid to the Selby Smelting and Lead Company, on interest on moneys advanced within the past year and a half the sum of \$150 and upwards; that the same officers have in addition paid other interest charges in the past two years on borrowed moneys, which have been drawn from the Treasury of the Company by said Wm. S. Noyes, during the periods of time aforesaid.

That on or about September 4th, 1915, said Wm. S. Noyes held a \$10,000 overdue note against said corporation on which he is drawing interest at 8% per annum, and while holding said note has drawn the payment of \$5819.15 on the ore purchase

**Supplemental Affidavit in Support of Application
for Temporary Injunction.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. S. Overton, being first duly sworn on oath deposes and says: That he is one of the complainants in the above-entitled action, and makes this his supplemental affidavit on application by said complainants for the appointment of a receiver and for a temporary injunction. That since the preparation of the said motion deponent has discovered further facts material to said application, as follows:

That on or about the 23d day of September, 1915, L. Osborn resigned as Secretary and director of the Presidio Mining Company, and that one John Doherty was elected a director in his place and stead; that said John Doherty is a brother of L. M. Doherty, also a director of said corporation, and a defendant herein; that on or about said 23d day of September, 1915, John W. F. Peat was appointed Secretary of said company, at a salary of \$270.00 per month; that the said office of said corporation is, according to a notice upon the door thereof, to be open between the hours of 10 A. M. and 3 P. M., excepting on Saturdays, when the time given is from 10 to 12 A. M. That deponent on numerous occasions has been to said office to get information during said business hours and has found the same closed; that [11] deponent, since his return from

Texas on the 9th day of November, 1915, to date hereof has been able to get into said office but three times during said business hours above mentioned, although he has made ten attempts to get in during said announced office hours. That on October 15, 1915, deponent went to the office of counsel for defendants and requested that the office of said company be kept open during office hours and that he, said counsel, instruct his clients so to do; that to the best of deponent's knowledge and belief, said John W. F. Peat, one of the defendants in the above-entitled action, is engaged in other businesses in addition to that as secretary of said Presidio Mining Company, and spends most of his time attending to the same, and not to its affairs.

Deponent further says that B. S. Noyes, one of the defendants in the above-entitled action, in the presence of William S. Noyes, also a defendant herein, and also in the presence of their counsel, admitted the embezzlement by L. Osborn of the sum of \$10,689.75 from the treasury of the company, and that William S. Noyes used nearly all of the sum of \$11,000 obtained from the treasury of the company on the 24th and 28th days of February, 1913, in covering the shortage of said L. Osborn in said sum of \$10,689.75; that deponent accused said William S. Noyes, on or about the 14th day of October, 1915, of securing said Osborn's stock for compounding a felony, to wit, a crime committed by said L. Osborn, and said B. S. Noyes answered, in substance: "You could not expect anyone to give another ten thousand dollars for

nothing," and the said William S. Noyes did not contradict said statement. Said defendants further admitted, on or about said date, the retention of said Osborn as secretary of said company on a salary of \$300.00 per month, or thereabouts, for more than two and a half years since his embezzlement was covered [12] up and concealed by said W. S. Noyes; that said B. S. Noyes, William S. Noyes, and John W. F. Peat have admitted in the presence of deponent that they knew of the peculations of said Osborn of the sum of over ten thousand dollars of the company's funds, and that they concealed the same from the minority stockholders of said Presidio Mining Company; further that this deponent learned of said peculations from the State of Texas, and endeavored to trace the same in the books of the corporation in San Francisco, but found that the books and records hereinafter enumerated, and from which could be traced the amounts of said peculations during the years 1911 and 1912 and prior thereto, were missing, which said books and records this deponent has demanded, and which are missing from the company's records, said books and documents being as follows:

All canceled checks prior to January, 1913;

All check stub-books prior to March 18, 1913;

All bank pass-books prior to March 18, 1914;

All monthly bank statements prior to February 28, 1913;

That the last embezzlement known to deponent occurred January 16, 1913.

That deponent heard rumors from Texas that the

peculations of L. Osborn amounted to \$27,000, which led to his investigation and discovery of the sum of \$10,689.75, and after checking up and proving the same, it was admitted by the said last above-named directors of said Presidio Mining Company, although shortages in said accounts of L. Osborn had previously been denied to deponent. Said defendant William S. Noyes at said time and place also stated that he had destroyed certain Thiel and other detective reports in his possession, paid for from the treasury of the company; that said defendants have [13] refused to give any aid to deponent, and have refused to permit him to obtain access to the Thiel Company's records containing any references or memoranda covering said reports or their contents; and said defendants William S. Noyes and B. S. Noyes have destroyed correspondence passing between themselves and E. M. Gleim, the present superintendent of said mine in Shafter, Presidio County, Texas, and said E. M. Gleim at said time and place admitted in the presence of said B. S. Noyes and William S. Noyes and deponent that he had destroyed and had continued to destroy all letters received from the office of William S. Noyes, its Vice-president and General Manager, which did not have the title "Superintendent" on the envelope, even though the contents of said letters referred to company matters. Deponent further says that at said time and place, to wit, October 14, 1915, in San Francisco, the physical condition of said Osborn was represented to deponent to be so serious that he could not be seen,

and that he was practically in a dying condition; that thereafter, and on or about the 9th day of November, 1915, William Osborn, son of said L. Osborn, filed a petition in the Superior Court of the State of California, in and for the city and county of San Francisco, stating the said L. Osborn was excessively addicted to the use of intoxicating liquors and stimulants, and that he was an inebriate, and that if said L. Osborn would be committed to the State Hospital for treatment there were reasonable grounds for believing that he would be permanently benefited thereby; that thereupon an order of arrest was made by Honorable E. P. Mogan, Judge of said Superior Court, and that on the 10th day of November, 1915, said L. Osborn was found to be addicted to the intemperate use of stimulants, and was after hearing, and without any objection on his part appearing, ordered [14] committed to Agnew's State Hospital for treatment, and is now in said institution; that deponent believes, and so avers the fact to be, that said defendant L. Osborn was committed to said institution to prevent a criminal prosecution for his embezzlement of the company's funds, and that said commitment was made after this deponent had threatened to attempt to secure an indictment by the Grand Jury of the city and county of San Francisco against said L. Osborn, and this deponent had placed before the office of the District Attorney of the city and county of San Francisco the facts thereof against said L. Osborn, and also facts relative to his having made false affidavits as to the financial affairs and

condition of the said corporation. Deponent further says that he has been informed by F. H. Gardiner and E. A. Herger, former directors of the Presidio Mining Company, that the purported minutes of the meeting of the Board of Directors of said company, held January 29, 1913, and as found on pages 28 and 30 of the minute-book of said company, do not contain a correct account of the proceedings of said meeting; deponent is informed and believes, and so avers, that said minutes are false in this, viz.: that said minutes falsely state that B. S. Noyes was elected a director and President of said corporation; that said minutes falsely state that John W. F. Peat resigned as President of said corporation, and was elected Assistant Secretary of said company; that a copy of said minutes relative to the foregoing facts as found on pages 28 and 30 of the minute-book of said corporation is attached hereto, marked Exhibit "A."

That deponent further says that by reason of the purported election of B. S. Noyes as a director of the Presidio [15] Mining Company on January 29, 1913, and the subsequent resignation of F. H. Gardiner and E. A. Herger, that a quorum was not present on January 31, 1913, at a purported meeting of the Board of Directors of the Presidio Mining Company, at which time William S. Noyes and L. M. Doherty were alleged to have been elected directors; that the only legally elected directors at said meeting on January 31, 1913, and also at the meeting of February 15, 1913, were L. Osborn and J. W. F. Peat, being only two out of five directors

of said company. That on February 15, 1913, at said purported directors' meeting of said company, there was adopted the so-called "bonus" resolution authorizing the payment of \$45,000 to William S. Noyes for securing a lease on said Section 5 from the Silver Hill Mill & Mining Company as the ostensible owner thereof (and at which time William S. Noyes was the real owner of said Section 5, by reason of his having obtained the possession of practically all of the capital stock of said Silver Hill Mill & Mining Co.), and by which resolution \$11,000 was ordered to be paid forthwith to said William S. Noyes by a Board of Directors of which L. Osborn and John W. F. Peat were the only legally authorized directors to vote, and which authorization directing the payment of said \$11,000 was voted upon by said L. Osborn and John W. F. Peat, together with B. S. Noyes and L. M. Doherty, and pursuant to which \$11,000 was drawn from the company's treasury and paid to said William S. Noyes, and practically said entire amount, to wit, \$10,689.75, was used by said William S. Noyes in making good the then existing shortage of L. Osborn.

Deponent further says that he has endeavored to ascertain the cost of production of ore from Section 5, and the quantity produced since January 25, 1913, to date hereof, and the methods [16] of computing the cost and the manner of figuring the net profits thereof, and has applied to the offices of the company in San Francisco for the records so to do, that he might get expert advice to assist him. That the officials in the San Francisco office of said

company have informed deponent that said records of said production were at the mine in Texas; that said deponent, just prior to the 1st day of November, 1915, applied to B. S. Noyes, President of said corporation, for authority to see all records in the company office in Texas, and said official refused to give deponent permission so to do; that attached hereto, marked Exhibits "B" and "C," are copies of letters sent to the Presidio Mining Company officials, and in response to which John W. F. Peat, the Secretary of said corporation, stated that B. S. Noyes, President of said Presidio Mining Company, refused to answer said letters; that attached hereto, marked Exhibit "D," is a copy of a letter sent to said President, B. S. Noyes, on the 2d day of November, 1915, at the time of this deponent leaving for Texas, requesting permission to use the books and records of said corporation at its mine in Shafter, Texas; that said office in Shafter, Texas, does a large and involved business requiring the keeping of numerous and sundry accounts, receipts and vouchers, and disburses approximately twenty thousand dollars per month; that said records are important, and deponent desires to have access thereto and have the same experted. That while in Texas within the past thirty days, deponent applied to E. M. Gleim, the superintendent in charge of said mine in Texas, for permission to look through the company's books and records there, and said E. M. Gleim notified deponent that on the advice and instructions of counsel for defendants herein, and acting under the orders of B. S. Noyes,

[17] President of the company, he, said E. M. Gleim, refused to give this deponent any opportunity to inspect the books or records in his charge at said mine. That within the last two weeks, in the office of the District Attorney of the city and county of San Francisco, statements and representations on behalf of defendants have been made that deponent had had access to all the books and records of the company relative to its affairs; that this deponent states that important records relative to the production of ore from Sec. 5 have been withheld from him by the officers of said Presidio Mining Company, who have represented to him that the records necessary thereto were in the company office in Texas, and that the above refusal on the part of the Supt., E. M. Gleim, for deponent to see said records prevents his ascertaining how or by what means, or the truthfulness of, the computations made by which William S. Noyes bases his claims and draws out money from the company's treasury from time to time in addition to his salary.

Deponent further says, that since the submission of the application for a temporary restraining order, said Wm. S. Noyes has drawn the following sums from the company's treasury—viz., \$3650, Nov. 15, 1915, and \$2556.60, Dec. 1, 1915, claiming the same for ore taken from Sec. 5; this deponent further avers that he believes, that unless restrained, the said defendants, and particularly said Wm. S. Noyes, will continue to draw large sums of money from the company's treasury, to the detriment and injury of deponent and the other minority stockholders of said company.

Deponent further says that unless restrained and prevented from drawing further sums from the treasury of the company by the said San Francisco officers and directors of said [18] corporation, both as salaries and otherwise, excepting only for the payment of such sums as are reasonably necessary to carry on and conduct operations at the mine in Texas, that the minority stockholders of said Presidio Mining Company will suffer irreparable injury and damage, and that they have no plain, speedy or adequate remedy at law. And further deponent sayeth not.

W. S. OVERTON.

Subscribed and sworn to before me this 4th day of December, 1915.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of
San Francisco, State of California. [19]

Exhibit "A."

(From Page 28, Minute-book.)

San Francisco, Cal., January 29, 1913.

DIRECTORS' MEETING.

A meeting of the Board of Directors of the Presidio Mining Company called by order of the President was held this day at the office of the Company room No. 204 No. 255 California Street, City and County of San Francisco, State of California.

Notices in writing were served upon each director and there were present thereat a majority of the Board as follows:—John W. F. Peat, presiding,

F. H. Gardiner, E. A. Herger, L. Osborn. Chas. H. Fish was absent.

(From Page 30.)

Whereas Chas. H. Fish, one of the members of this Board has ceased to be a stockholder in this corporation and for that reason is disqualified to serve as director, be it

Resolved that the place upon this Board of Directors heretofore occupied by said Chas. H. Fish be and the same is hereby declared vacant.

Upon motion duly made, seconded and carried Mr. B. S. Noyes was unanimously elected a director of this corporation in place of Chas. H. Fish to serve until the next election of the Board of Directors and until his successor is elected and qualified.

Mr. John W. F. Peat thereupon tendered his resignation as President of this corporation.

Upon motion duly made, seconded and carried, Mr. B. S. Noyes was unanimously elected President of this corporation. [20]

Upon motion duly made, seconded and carried Mr. John W. F. Peat was elected Assistant Secretary of this corporation and his salary fixed at \$25.00 per month.

Upon motion of F. H. Gardiner seconded by E. A. Herger, it was

Resolved that the President and Secretary of this Company are jointly authorized to sign the name of this company to checks, drafts, bills of exchange, notes and other evidences of indebtedness and the President shall have power to confer the authority hereby given him on other officers of the Company

as may, in his judgment, be necessary to facilitate its business.

The Secretary now paid to each director present the sum of \$5.00 making a total of \$20.00.

There being no further business before the meeting, upon motion duly made and seconded the meeting adjourned. [21]

Exhibit "B."

Office PRESIDIO MINING CO.
255 California Street,
San Francisco, Cal.

October 27, 1915.

President,

Presidio Mining Company,
San Francisco, Cal.

Sir:—

Replying to your letter of October 23, 1915:

1. The Secretary of the Presidio Mining Company is unable to or fails to furnish for my inspection any of the papers or records enumerated in paragraph 1 of my letter of October 15, 1915.

2. In reply to my request in letters of October 15 and 21, you state "There are no reports in the office or in the possession of Mr. W. S. Noyes or myself from any detective agency. I decline to write any letter for you excepting such as are required by law."

Acting under advice of my attorney I wish to call your attention to Paragraph 565 of the Penal Code, State of California:

“Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.”

I wish to remind you that these papers *were* in the “custody” of the present officers of the Presidio Mining Company until they were destroyed by Mr. W. S. Noyes, as he has himself admitted; these papers are now under the “control” of said officers because their authorization will enable me to see these reports now intact and in the possession of the Thiel Detective Agency, El Paso.

I have been informed by those who have them that some of these reports had to do with the personal affairs of Mr. W. S. Noyes, although they were paid for as being company business. The destruction of these reports and the emphatic refusal of the officials of the Presidio Mining Company to allow me to see them, though they claim them to be relating only to business of the company, bears out my other evidence as to their real nature.

I therefore renew my request that I be given written authority to see these reports in possession of the Thiel Detective Agency at El Paso, in accordance with Paragraph 565 above quoted.

3. In paragraph 4 of your letter you state “All letters [22] of Presidio Mining Company, sent or

received, are in the office. The private files of Mr. W. S. Noyes and myself will not be opened to you."

I have no desire to inspect the private files of any person on any matter. I deny however the right of any salaried officer of the Presidio Mining Company to keep in his private files or to destroy any letter or record pertaining to the company of which I am a stockholder. At the mine in August, 1915, the superintendent admitted to me that if an envelope was addressed to him personally he destroyed the letter, though it was from Company officials and bore on company matters. Though as a stockholder I then warned him not to do so, he again admitted in the office of the Bond and Warrant Clerk, October 14, 1915, that he has continued the same practice.

I therefore call for the complete files of all letters sent or received by any of the salaried officers of the corporation relating in any way to company business. I also call upon you to direct the Superintendent at the mine to furnish me, when I go there to inspect, with a complete file of all letters and code messages, etc., received and sent by him relating in any way to company matters.

4. In your letter of October 25 to the Superintendent of the mine in compliance with my written request of October 21, you give me authority to visit the mine, but say nothing about inspecting the company books and records in the office at the time.

I must therefore repeat my request and ask that you give the Superintendent the same instructions as to the books and records and all company papers

that you have given in your letter of October 25 regarding the mine, including the right to inspect the same with expert assistance.

As I expect to leave for the mine as soon after November 1 as possible, early attention to this letter would be appreciated.

Yours truly,

(Signed) W. S. OVERTON. [23]

Exhibit "C."

Office PRESIDIO MINING CO.

255 California St.

San Francisco, Cal.

October 30, 1915.

President,

Presidio Mining Co.

In my letter of recent date I asked for early attention because as stated in my letter I expected to leave for Texas as soon after Nov. 1st as possible.

In view of this fact and also we are to appear in the Bond & Warrant's Clerk's office at 11 A. M. on Monday, Nov. 1st, I request that my letter be answered before this meeting, so that I may act accordingly.

I will be in the company office at 12 o'clock to-day and if it is impossible to get an answer by that time, I will be again in the office at 10 o'clock Monday morning.

Yours truly,

(Signed) W. S. OVERTON. [24]

Exhibit "D."

995 Pine St., San Francisco, Cal.

November 2, 1915.

The President Presidio Mining Co.,
San Francisco, Cal.

Sir:—

I wish to acknowledge the message you sent me verbally by Mr. J. W. F. Peat, Secretary. Mr. Peat informs me that you sent the information that you refused to answer my letters because you were tired of writing letters to me.

I have also received the message from your counsel, Mr. R. F. Harding, that you refuse to allow me to see the records and books kept at the mine at Shafter, Texas.

In this connection, I wish to call your attention to the threats Mr. L. Osborn, then secretary, made to me when I started my investigation. Among others I was threatened with financial ruin because "we have more money than you have." I do not state that this refusal on your part to permit a large stockholder to see his company records is part of the carrying out of this threat but I have the right to draw that conclusion.

In this connection I may add that Mr. Osborn made such a habit of threatening me that Mr. Peat, though himself unfriendly to me, protested to Mr. Osborn to stop it. These threats I have carefully written down at the time as he and Mr. Peat both know.

Further, since I have proved embezzlement of large sums aggregating \$10689.75 in this office, and you have admitted in the District Attorney's office that you knew and concealed this embezzlement, I feel justified in drawing the conclusion that there are other matters you are endeavoring to conceal by refusing me to see those books. I therefore ask you to rescind your orders that I am not to have access to the books at the mine.

Very truly,
(Signed) W. S. OVERTON.

Copy of within affidavit received this 6th day of December, 1915.

R. T. HARDING,
HENRY E. MONROE,
Attys. for Defendants.

[Endorsed]: Filed Dec. 7, 1915. W. B. Maling,
Clerk. By J. A. Shaertzer, Deputy Clerk. [25]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Supplemental Affidavit in Support of Application
for Temporary Injunction.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Frank H. Gardiner, being first duly sworn on oath deposes and says: That he is and has been for a number of years last past continuously a resident of the city and county of San Francisco, State of California, and is a citizen of said State, and is not a party to the above-entitled suit. That on the 29th day of January, 1913, deponent was a director of the Presidio Mining Company; that he had been a director of said corporation continuously since on or about the 4th day of March, 1907, and was such up to and including the said 29th day of January, 1913; that on said 29th day of January, 1913, the directors of said corporation were L. Osborn, John W. F. Peat, Charles H. Fish, E. A. Herger and deponent; that on said 29th day of January, 1913, a directors' meeting was held in the office of the said Presidio Mining Company, in the city and county of San Francisco, State of California, at which meeting this deponent was present. [26]

That to the best recollection and belief of this deponent the purported minutes of the Presidio Mining Company, as set forth on pages 28 and 30 of the minute-book of said corporation, a portion of which minutes are attached hereto by copy thereof marked Exhibit "A," do not set forth what actually

transpired at said meeting, and are false in the following particulars:

That it is not true that "the place upon this Board of Directors heretofore occupied by said Chas. H. Fish be and the same is hereby declared vacant." Said purported minutes are further false in stating that B. S. Noyes was unanimously elected a director in the place of Charles H. Fish. Said purported minutes are also false in setting forth that John W. F. Peat tendered his resignation as President of the corporation. Said purported minutes are further false in this, that they state B. S. Noyes was unanimously elected President of this corporation. They are also false in this, that they state that John W. F. Peat was elected Assistant Secretary of this corporation and his salary fixed at \$25 a month. This deponent distinctly recollects the resolution relative to the execution of that certain lease between the Silver Hill Mill & Mining Company and the Presidio Mining Company dated January 25, 1913, by the terms of which fifty cents per ton royalty was to be paid by the Presidio Mining Company for all ores extracted by it from Sec. 5 adjoining its property.

This deponent further says, he never attended further meetings of said Board of Directors of Presidio Mining Company after January 29, 1913; that he knew nothing of said records till the matter was called to his attention by Captain W. S. Overton on or about October 23, 1915; that deponent resigned as a director of said Presidio Mining Company upon request, on or about [27] the 31st day of Janu-

ary, 1913, and after the meeting held on said 29th day of January, 1913; deponent further says that he held ten shares of stock of said corporation, and endorsed the same in blank on the certificate evidencing said shares, and that the said certificate was kept by L. Osborn. Further deponent sayeth not.

FRANK H. GARDINER.

Subscribed and sworn to before me this 4th day of December, 1915.

[Seal]

HUGH F. SIME,

Notary Public in and for the City and County of San Francisco, State of California. [28]

Exhibit "A."

(From Page 28, Minute-book.)

San Francisco, Cal., January 29, 1913.

DIRECTORS' MEETING.

A meeting of the Board of Directors of the Presidio Mining Company called by order of the President was held this day at the office of the Company room No. 204 No. 255 California Street, City and County of San Francisco, State of California.

Notices in writing were served upon each director and there were present thereat a majority of the Board as follows: John W. F. Peat, presiding, F. H. Gardiner, E. A. Herger, L. Osborn. Chas. H. Fish was absent.

(From Page 30.)

Whereas Chas. H. Fish, one of the members of this Board has ceased to be a stockholder in this

corporation and for that reason is disqualified to serve as director, be it

Resolved that the place upon this Board of Directors heretofore occupied by said Chas. H. Fish be and the same is hereby declared vacant.

Upon motion duly made, seconded and carried Mr. B. S. Noyes was unanimously elected a director of this corporation in place of Chas. H. Fish to serve until the next election of the Board of Directors and until his successor is elected and qualified.

Mr. John W. F. Peat thereupon tendered his resignation as President of this corporation.

Upon motion duly made, seconded and carried, Mr. B. S. Noyes was unanimously elected President of this corporation. [29]

Upon motion duly made, seconded and carried Mr. John W. F. Peat was elected Assistant Secretary of this corporation and his salary fixed at \$25.00 per month.

Upon motion of F. H. Gardiner seconded by E. A. Herger, it was

Resolved that the President and Secretary of this Company are jointly authorized to sign the name of this company to checks, drafts, bills of exchange, notes and other evidences of indebtedness and the President shall have power to confer the authority hereby given him on other officers of the Company as may, in his judgment, be necessary to facilitate its business.

The Secretary now paid to each director present the sum of \$5.00 making a total of \$20.00.

There being no further business before the meeting, upon motion duly made and seconded the meeting adjourned.

Copy of within affidavit received this 6th day of December, 1915.

R. T. HARDING,
HENRY E. MONROE,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 7, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON, and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

**Supplemental Affidavit in Support of Application
for Temporary Injunction.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

E. A. Herger, being first duly sworn on oath de-

poses and says: That he is a citizen of the State of California and a resident of the city and county of San Francisco, in said state and is not a party to the above suit. That from on or about the 4th day of March, 1907, continuously up to and including on or about January 31, 1913, deponent was a director of the Presidio Mining Company, one of the defendants above named; that on the 29th day of January, 1913, L. Osborn, John W. F. Peat, Charles H. Fish, F. H. Gardiner and deponent were directors of said Presidio Mining Company; that said directors last above named were such at a meeting of said board held January 29, 1913; that on or about October 27th, 1915, in San Francisco, deponent had shown him by Capt. W. S. Overton, a purported copy of the minutes of said meeting of the said board of directors of said Presidio Mining Company, held January 29, 1913; that said purported minutes, to the best recollection and belief of deponent are false in the following respects:

In stating that B. S. Noyes was elected a director and president of said corporation; in stating that John W. F. Peat [31] resigned as President of said corporation and was elected assistant secretary of said company at a salary of \$25 per month.

That shortly after January 29, 1913, deponent received notice that his relations with said Presidio Mining Company were terminated. That deponent remembers voting on January 29, 1913, for the resolution whereby the payment of 50 cents per ton royalty was authorized to be paid for all ore taken

from Section 5, the property adjoining the ground of the said Presidio Mining Company.

That while deponent was a director of said company, his stock was indorsed by him and remained in the possession of the Secretary, L. Osborn.

Further deponent sayeth not.

E. A. HERGER.

Subscribed and sworn to before me this 6th day of December 1915.

[Seal]

W. H. PYBURN,
Notary Public in and for the City and County of
San Francisco, State of California.

Copy of the within affidavit received this 6th day of December, 1915.

R. T. HARDING,
HENRY E. MONROE,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 7, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the District Court of the United States in and
for the Northern District of California, Sec-
ond Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN
Complainants,

vs.

PRESIDIO MINING COMPANY a Corporation,
WM. S. NOYES B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

**Affidavit of W. S. Noyes in Reply to Supplemental
Affidavits of Plaintiffs.**

State of California,
City and County of San Francisco,—ss.

W. S. Noyes, being first duly sworn, deposes and
says: That he is one of the defendants in the above-
entitled action, and makes this affidavit in reply to
the so-called “supplemental affidavit in support of
application for temporary injunction” of W. S. Over-
ton, filed herein on the 7th day of December, 1915.

Affiant admits that on or about the 23d day of
September, 1915, L. Osborn resigned as Secretary
and also as a director of the Presidio Mining Com-
pany, and that John Doherty was elected a director
in the place of the said Osborn; that said John
Doherty is a brother of L. M. Doherty who is also
a director and a defendant herein; that on or about

said 23d day of September, 1915, John W. F. Peat was appointed Secretary of said corporation, at a salary of \$270.00 per month.

Answering that portion of said affidavit commencing with line 14 on page 2 thereof and ending with the word "statement" [33] in line 28 on said page 2, this deponent says that said matter as there set forth is false and untrue, except as hereinafter stated; and in regard to said matter, answers as follows:

That on or about the 14th day of October, 1915, this deponent, together with the defendant B. S. Noyes and their counsel, R. T. Harding, appeared before R. W. Barrett, a Deputy District Attorney for the city and county of San Francisco, from whom the plaintiff W. S. Overton was seeking to obtain a warrant for the arrest of the defendant L. Osborn, on a charge of embezzlement, and a warrant of arrest for this defendant on a charge of compounding said alleged crime of embezzlement. That this deponent and the said B. S. Noyes stated to said Barrett that in January of 1913 they had discovered that the said L. Osborn was short in his accounts with said corporation in the sum of \$10,-689.75. That affiant further informed said Barrett that in February 1913, he had loaned the said L. Osborn the sum of \$10,689.75 with which to make good said shortage, and that said shortage had then been made good and that none had existed since that time; and further, that at the time of said loan this affiant had taken the promissory note of said Osborn for said sum, and that the same was secured

by a pledge of stock in the Presidio Mining Company owned by said Osborn. That said loan remained unpaid, and that affiant still held said note and security.

That the said Overton then and there charged that the act of this deponent in loaning said sum of \$10,689.75 to the said Osborn and taking security therefor constituted the crime of "compounding a felony." That in response to said charge the defendant B. S. Noyes remarked that "You could not expect anyone to lend another ten thousand dollars without security" or used words to that effect. That said B. S. Noyes did not make the [34] statement, "you cannot expect anyone to give another ten thousand dollars for nothing" or any other similar statement in connection with or bearing upon the charge that this deponent had received anything from said Osborn for said loan, other than said promissory note and the security therefor.

Further answering said last-mentioned portion of said affidavit to the effect "that W. S. Noyes used nearly all of the sum of \$11,000 obtained from the treasury of the company on the 24th and 28th days of February, 1913," this deponent says that said \$11,000 is a portion of the moneys paid to this affiant by the Presidio Mining Company on account of ore purchases made by said Company from him, as fully set forth in the answer of this affiant in this suit, and particular reference is here made to the following portions of the answer of this deponent in the matter of the above-entitled action, to wit:

Commencing with line 29 on page 50 thereof, down to and including the word "lessor" in line 12, on page 53 thereof.

Further referring to said shortage of \$10,689.75, deponent says that the same was discovered on or about the 19th day of January, 1913, and that all of the transactions out of which said shortage accrued, took place prior to said 19th day of January, 1913, and that this deponent had no knowledge or [35] suspicion thereof prior to said date.

That for a long time prior to the 12th day of December, 1912, this deponent had been the owner of 28,507 shares of the capital stock of said Company standing on the books of the Company in the name of L. Osborn, and that he had said shares transferred into his name on said last-mentioned date. Deponent further says that neither the acquisition by him of said shares of stock, nor the transfer thereof into his own name had any connection with or relation to said shortage.

Deponent further states that he became a director of said Presidio Mining Company on the 31st day of January, 1913, and that the defendant B. S. Noyes became a director of said corporation on the 29th day of January, 1913. That the said L. Osborn had held the office of Secretary of said corporation at a salary of \$300 per month for about twenty-five years prior to the discovery of said shortage, and that it is true that said L. Osborn was permitted to hold said position at said salary until he resigned as Secretary and director on or about September 23d, 1915. That the facts and circumstances under

which he was allowed to continue in said position of Secretary are as follows:

That shortly after said shortage was discovered he consulted with Mrs. India Scott Willis, who was then the holder of about 37,000 shares of the capital stock of said Presidio Mining Company. That the said Osborn was a personal friend of Mrs. Willis and had been in the employ of said company for over twenty-five years, and had grown old in its service, and was dependent upon his salary from said Company for his support, and that of his family. That it was the desire of Mrs. Willis that said Osborn should be continued in the employ of the Company, if it could be done with [36] safety, and that said matter should not become public and bring humiliation upon his innocent family. That this affiant demanded as a continuance of such employment that he and his brother B. S. Noyes should be elected directors of said Company, and also demanded that the said India Scott Willis should go on said Board, or that she should name a responsible representative upon said Board. That said arrangement was assented to by the said Mrs. Willis, and it was arranged that the defendant B. S. Noyes should also be elected President of the Company and that this affiant should be elected Vice-President, so that the said B. S. Noyes or this affiant would have to sign all corporate checks and could by that means safeguard the corporation against future tampering with its funds.

That in pursuance of said arrangement the said B. S. Noyes was elected a director of said corpora-

tion on the 29th day of January, 1913, and was also elected President on said day. That the said India Scott Willis requested that the defendant L. M. Doherty be elected a director of said corporation to represent her on said Board, and that thereafter at a meeting of said Board held on January 31st, 1913, this affiant was elected a director and also Vice-President, and the said L. M. Doherty was elected a director.

That at said time said corporation was in a precarious financial condition, and was seeking to install a cyanide plant and other needed machinery and improvements to save it from financial ruin. That Mrs. Willis and this affiant and other stockholders to whom said shortage was known realized that if the same became known, the credit of said corporation would be so seriously affected as to make it impossible to install said needed improvements, and for that reason said fact was not made [37] known to more persons than necessary for the benefit of all stockholders, including said plaintiff.

In this connection affiant further says that for more than six years prior to February, 1913, the affairs of said corporation had been conducted by the said Osborn, as Secretary and director in conjunction with four dummy directors, of whom Chas. H. Fish was succeeded by B. S. Noyes on said Board, and of whom F. H. Gardiner and E. A. Herger were succeeded on said Board by this affiant and the said L. M. Doherty.

That it is true that the cancelled checks of said

corporation prior to January, 1913, cannot be found and that the check stub-book and pass-book prior to March, 1913, cannot be found; that it is also true that the monthly bank statements prior to February, 1913, could not be found, but were replaced by statements obtained from the books of the bank, at the request of the plaintiff W. S. Overton, and were placed in his hands for examination.

That the present officers of said corporation had the books of said corporation examined by Stewart & Haley expert accountants in the month of July, 1915, and that said accounts were found to be correct, and that said plaintiff W. S. Overton was furnished the report of said accountants and was permitted to make a copy thereof and was also furnished full access to all books, accounts and data kept by the corporation at its office in San Francisco, California; and that said books of account kept by said corporation since the present Board of Directors have been in office show every item of receipts and expenditures, and the source whence received and the purposes for which expended.

Answering said portion of said affidavit of W. S. [38] Overton, wherein at the bottom of page 3 thereof, he states that "said defendant William S. Noyes at said time and place also stated that he had destroyed certain Thiel and other detective reports in his possession, and paid for from the treasury of the company; and that said defendants have refused to give any aid to deponent, and have refused to permit him to obtain access to the Thiel Company's records contain-

ing any references or memorandum covering said reports or their contents." This affiant says, that said reports were obtained to ascertain the identity and operations of labor trouble makers at the works of the corporation at Shafter, Presidio County, Texas. That said corporation employs about 150 laborers at its mine and mill at said place and that about two-thirds of said number are Mexicans. That certain ring-leaders among them have constantly endeavored to enlist said Mexicans on one side or the other of the Mexican Revolutionary movements and have sought to embroil said laborers in partisan strife to the great danger of the Company's property and welfare. That it was necessary for the peace and safety of said corporation and its property to ascertain said disturbers and trouble-makers in order that they might be weeded out, and to that end employed detectives of the Thiel Detective Agency which has an office at El Paso, Texas. That the reports so obtained were confidential and if not kept confidential, such agency would no longer furnish such services, should they be required in the future. That the original of said reports were sent to the Superintendent at Shafter, Texas, and copies thereof were furnished to this affiant at San Francisco. That when said reports had served their purpose, the same were destroyed, in order that their contents should not become public, and further that the officers of said corporation have declined to give said plaintiff W. S. Overton an order upon said Thiel Agency for an inspection of their files, for the [39] reason that

such order would be in violation of the contract between the corporation and said Agency to treat said reports as confidential.

Answering said affidavit as to the matter therein contained on page 4 thereof that this affiant has destroyed correspondence between himself and E. M. Gleim, the present superintendent, this affiant says that all official correspondence between this affiant and said Gleim is now on file in the Company's office and that none of such correspondence has been destroyed, and that no other records of said Company have been destroyed or withheld from said plaintiff since the present Board of Directors have been in office.

Answering that portion of said affidavit commencing with line 28 on page 6 thereof, and ending with the word "experted" in line 25 on page 7 thereof, this deponent says that said Section 8 and Section 5 mentioned in said affidavit are adjoining mines of like character and are connected by tunnels and underground drifts, and that the cost of mining in said two properties is now the same and that the methods of computing the cost and the manner of figuring the net profits thereof is the same as to both properties, and that no segregation of costs of production of ore from said two mines is kept by the said Presidio Mining Company otherwise than hereinafter stated. That the agreement between this deponent, as party of the first part, and the Presidio Mining Company, as party of the second part, dated the 19th day of November, 1913, and under the terms and provisions of which said Sec-

tion 5 is now worked by said Presidio Mining Company, contains the following provisions, to wit:

“A record shall be kept of the number of tons of ore taken by the party of the second part (Presidio Mining Company) [40] from said mine (Section 5) and the average assay thereof in the stope from which it is taken; a similar record shall be kept of the ore taken by the party of the second part during the same period from its own mine (Section 8) and from the two records so obtained and kept, the average stope assays of all the ores milled from both of said mines for a given period shall be deduced. After said ore shall have been milled, the average extraction in fine ounces of silver shall be ascertained and the percentage or average stope assays actually extracted shall be calculated and determined and the gross value of its ore taken during such period from the Silver Hill Mine (Section 5) shall be deemed to be the average stope assays multiplied by said percentage of extraction. From such gross value the actual cost of mining and milling, less the sum of One (1) Dollar per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of the party of the second part, shall be deducted and the difference shall constitute the net value of the ore so taken during that period by the party of the second part from the said Silver Hill Mine. Freight, expressage, insurance and the refinery charges upon the bullion obtained from such

ores shall be treated as a part of the cost of reduction."

In regard to said contract, this deponent says that at the time of the making of said contract the actual cost of mining and milling ores from said Section 5 was estimated to be less by the sum of one (1) dollar per ton than the cost of mining and milling ores from Section 8, but that in September, 1914, it was ascertained that the cost of mining and milling said ores from said two properties was about equal, and that such condition has existed ever since said time, and that by reason of such condition this affiant has waived said allowance of one (1) dollar per ton made to him under said contract for ores extracted from said Section 5, and that ever since said September, 1914, the cost of production from said two properties has been figured at the same price. That for the reasons aforesaid, no segregated pay-rolls of Section 5 and Section 8 are kept and no segregated account of supplies used in mining said two properties are kept by the Presidio Mining Company. That separate and distinct accounts of the number of tons mined and milled from Section 8 are kept, and also separate and distinct accounts of the number of tons of ore mined from Section 5 are likewise kept. That distinct [41] records of the assays of stope samples from Section 8 and from Section 5 are kept. That the ore milled from Section 5 and the ore milled from Section 8 are commingled in the mill and cyanide plant of the Presidio Mining Company. That after the gross amount of bullion for each month has been ascertained, the value of the

ores from said Section 8 and from said Section 5 is then determined by calculation based upon the number of tons milled from Section 8 and Section 5 proportionate to the stope assays and tonnage of the ores from Section 8 and the stope assays and tonnage of the ore from Section 5. That at the end of each month the superintendent reports to the San Francisco office the number of tons of ore milled from Section 8 and the number of tons of ore milled from Section 5 together with the average stope assay value of ore milled from Section 8 and of the ore milled from Section 5, and also the ounces contained in the ore sent to the mill from each mine, according to the tonnage and said stope assays. That all bullion extracted from said mill and cyanide plant is shipped by him from day to day, or immediately after each clean-up, to the Selby Smelting and Lead Company at Selby, California, and that after full return at the end of each month are obtained from said refining company, the calculation is made at the San Francisco office, apportioning the relative amount of bullion obtained from Section 8 and that obtained from Section 5, as based upon the tonnage and stope assays from each of said mines. That at the end of each month the superintendent sends his original report of the matters herein mentioned upon a form known as "Form #15," a copy of which form for the month of November, 1915 is hereto attached, marked Exhibit "A" and made a part of this affidavit, and that such monthly reports constitute a part of the records of the Presidio Mining Company at its San

Francisco office, and a [42] duplicate thereof constitutes the record kept at Shafter, at said mine, and the original of all other records kept at said mine are likewise forwarded by said superintendent to the San Francisco office, to wit, the original payroll for each month, together with all original vouchers for all expenditures made by said superintendent, and that all of such original records are on file in the office of said corporation at San Francisco and now are, and at all times have been open to the inspection of the said plaintiff W. S. Overton, and that the said W. S. Overton has repeatedly examined the same during the last five months, and has taken copies of most of them.

That no other accounts are kept at the mine of said corporation at Shafter, Texas, excepting the memorandum books of the mine foreman or tally keeper, who keeps the talley of the number of tons delivered from each of said properties to the mill, and tally-books kept by such foreman of the number of men employed under his direct supervision and the number of hours worked by each of such men, from which such foreman or shift boss makes periodical reports to the superintendent, and from which tally-books the payroll is constructed and the superintendent's memoranda of the number of tons delivered is computed.

This deponent therefor says that the said plaintiff has had access to all books and records of the Presidio Mining Company relative to its affairs, and denies that said plaintiff has been denied access to important or any records relative to the pro-

duction of ore from Section 5, and this deponent denies that it has been represented to said plaintiff that the records necessary to ascertain the production of ore from Section 5 were in the Company's office in Texas, and further says that there are no records in the office of the corporation at Shafter, Texas from which any other or different information can be obtained [43] than the information contained in the records in the office at the city of San Francisco,

Further deponent says, that said Presidio Mining Company keeps, and ever since the present Board of Directors have been in office, has kept at its office in the city and county of San Francisco, the following books of account, and records:

A ledger, a cash-book and journal, a file of returns for bullion sold, vouchers for every item of cash disbursed, a complete file of bank statements, and a file of superintendent's monthly reports, from all of which any accountant can, without explanation or aid, ascertain the tonnage for any given month, the total bullion sales, the value per ton, the value per ounce, the cost of production, the cost of production per ton, and the cost of production per ounce, and deponent further says that at all times, or for about the five months last past that said plaintiff Overton has been in San Francisco, all of said records and information have been at his disposal and subject to his examination.

That it is true that the officers of the Presidio Mining Company have refused to give said plaintiff an order upon the superintendent at Shafter,

Texas, permitting him to inspect the records there kept by the superintendent, for the reason that no additional information could be obtained by said plaintiff from said records other than that disclosed by the books in the office of the Company in San Francisco, and for the further reason that said officers believed that said plaintiff desired said order only for the purpose of harrassing and annoying said corporation and its superintendent at Shafter, Texas, and that said officers did not wish to needlessly annoy said superintendent by having his time distracted from his usual duties as such superintendent.

That as to the matter contained in said affidavit commencing with the word "deponent" in line 13, page 4, down to [44] and including the word "corporation" in line 13 of page 5, this deponent says that he has no information or belief as to said matters, other than reports made to him in regard to said Osborn by his son, William Osborn, and that from such reports he did believe and may have stated on October 14th, 1915, that the physical condition of said Osborn was serious and that he could not be seen. That this deponent did not say that said Osborn was in a dying condition, but at said time believed and may have stated that said Osborn, to the best of his information and belief, would probably not leave his house again. Deponent further says that he has not seen, and has not directly communicated with said Osborn since the latter part of August, 1915. That as to the statement in said affidavit contained that the said

Osborn has been committed to Agnews, and as to the conditions under which he was so committed, this deponent has no information or belief other than such as has been given to him by said William Osborn, the son of said L. Osborn. That deponent has been informed and believes that said Osborn has been committed to said asylum, but as to the grounds of his commitment and the manner thereof or the purposes thereof, this affiant has no information or belief.

W. S. NOYES.

Subscribed and sworn to before me this 16th day of December, 1915.

[Notarial Seal]

M. A. BRUSIE,

Notary Public in and for the City and County of
San Francisco, State of California. [45]

Exhibit "A"

FORM #15.

Shafter, Texas, December 2d, 1915.

PRESIDIO—SECTION 5.

APPORTIONMENT OF BULLION YIELD.

For November, 1915.

The ores extracted from the various workings during November were as follows:

Contents per Stope Samples	Stope Samples Ozs.	Ozs.
	18.5	49683.5
	24.9	53161.5

Tons.
2691.0
2135.0

	Tons.	Ozs.
Presidio		
Section 5.....		
	710.0	14.0
Mina Grande.....	532.0	37.3
Stope "13".....	618.0	33.7
Stope 137a.....	203.0	7.9
El Once.....	72.0	14.0
Prospect in 115A Sq. 11-H.....		
North End.....	52135.0	24.9
Gen Av.		4826.0
Total		
102945.0		

4826.0 21.3 Ozs. avg. all stopes.

E. M. GLEIM, Supt.
Per A. W. FROLLI.

Due service and receipt of a copy of the within Affidavit is hereby admitted this 16th day of December, 1915.

W. F. ROSE and
BRUCE GLIDDEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 16, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Plaintiffs,

vs.

PRESIDIO MINING COMPANY et al.,
Defendants.

**Answer of B. S. Noyes to Supplemental Affidavit
in Support of Application for Temporary
Injunction.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

B. S. Noyes, being first duly sworn, on oath deposes and says:

That he is one of the defendants in the above-entitled action and answering the supplemental affidavit of W. S. Overton in support of application

for temporary injunction, this deponent says, as follows:

That deponent is a director and the President of said defendant, Presidio Mining Company, and has been such director and president since the 29th day of January, 1913; that the office hours of said Presidio Mining Company are from 10 A. M. to 3 P. M. and that the Secretary of said corporation is the only person in charge thereof and that he has no assistant; that checks for bullion sold are received on the average of four times per week and it is necessary for said Secretary to leave said office for a short time nearly every day in order to transact the banking business of said corporation and it is the custom of said Secretary to leave said office about 11:45 A. M. to transact such banking business and to take his lunch, after which he returns to said office [47] at about the hour of 1 P. M., that deponent has frequently visited said office since his election as president and up to the present time and has always found said office open for the transaction of business and the Secretary present and in charge thereof; that the said John W. F. Peat is engaged in other business but deponent is informed and believes and upon such information and belief states that the said Peat attends to such other business before 10 A. M. or after 3 P. M.

Deponent admits that in the presence of defendant Wm. S. Noyes and of R. T. Harding, counsel for the defendant, this deponent admitted that a shortage of \$10,689.75 in the funds of said Presidio Mining Company had existed in January, 1913, but

this deponent did not admit that said Wm. S. Noyes used nearly all of the sum of \$11,000, collected by said Wm. S. Noyes from said Presidio Mining Company on the 24th and 28th days of February, 1913, in covering said shortage, but deponent states the facts in that regard to be: That said sum of \$11,000 was deposited in the bank account of said Wm. S. Noyes with his other funds and from his joint funds in the bank, said Wm. S. Noyes lent to said L. Osborn the sum of \$10,689.75, taking the promissory note of said Osborn, which was prepared by this deponent and secured by collateral; to wit, the stock of the said L. Osborn in said Presidio Mining Company.

This deponent admits that said Overton accused said Wm. S. Noyes, on or about the 14th day of October, 1915, of securing said Osborn's stock for compounding a felony and this deponent states that the said accusation made by said Overton was and is false, malicious and scandalous and in this connection this deponent states that to his personal knowledge said Wm. S. Noyes had owned the stock in question for many years prior to the 12th [48] day of December, 1912, and long prior to the discovery of said shortage.

As to the averment in said affidavit that this deponent answered in substance "You could not expect anyone to give another \$10,000 for nothing," this deponent denies that he did so answer in substance or make any answer whatsoever resembling the said statement but admits that this deponent

did say "you could not expect any man to lend another \$10,000 without taking security if he could get it" or words of similar import.

This deponent further states that said defendants, meaning thereby Wm. S. Noyes and this deponent, admitted that said Osborn was retained as Secretary of said company for more than two and a half years after the discovery of said shortage but denies that said shortage was concealed by said W. S. Noyes; and in this connection deponent states that the facts are as follows: That on or about the 19th day of January, 1913, this deponent discovered that the funds of said Presidio Mining Company were short; that deponent forthwith telegraphed this information in cipher to said W. S. Noyes at Marfa, Texas, and forthwith called upon Mrs. India Scott Willis and Miss L. M. Doherty, both of whom were large stockholders in said Presidio Mining Company, and informed them of his discovery; that both said last-named persons were much distressed at the information so given them by deponent and alarm for the probable effect of said shortage or its public disclosure on the company and its future welfare; that both said last-named persons expressed themselves as extremely desirous of avoiding any public disclosure of said shortage out of consideration for the welfare of the company and to spare Osborn and his family from humiliation; that because of the fact that W. S. Noyes was at the time in Texas making arrangements [49] for the installation of a cyanide plant and other improvements upon the company's pro-

perty, a financial crisis existed in the company's affairs and an immediate decision had to be made as to what course should be pursued; that within a few days thereafter, said W. S. Noyes returned to San Francisco and conferred again with said India Scott Willis, L. M. Doherty and this deponent, and it was then and there agreed, at the urgent desire of said India Scott Willis, that no disclosure of said shortage should be made and the said W. S. Noyes volunteered to furnish the necessary money and lend the same to said Osborn in order that said shortage should be made good.

This deponent denies that at any time he has destroyed any correspondence passing between himself and E. M. Gleim, the superintendent of said Presidio Mining Company, that related to the business of said corporation.

That as to the statements of said affidavit contained on page 4, line 18 to line 13 page 5 thereof, this deponent has no knowledge of the facts therein stated in regard to the filing of a petition in the Superior Court of the City and County of San Francisco for the commitment of said L. Osborn, the issuance of the said order of arrest and the order of commitment of said Osborn to the State Hospital at Agnews, nor the purpose of said commitment, and in this connection this deponent states that he has not seen or communicated with said Osborn since the month of August, 1915, excepting to inquire occasionally from William Osborn, the son of said L. Osborn about the state of his father's health.

This deponent denies on information and belief that the minutes of the meeting of the Board of Directors of said Presidio Mining Company, held on January 29th, 1913, and found on [50] pages 28 and 30 of the Minute-book of said company, are false in the particulars stated in the affidavit of said Overton, or at all, and in this regard, deponent states the following facts: That prior to the 29th day of January, 1913, it had been determined and agreed by the said India Scott Willis, L. M. Doherty and Wm. S. Noyes, that this deponent should be elected to the presidency of said company; that in order to accomplish that result, this deponent directed the said L. Osborn, Secretary of the said corporation, to transfer into the name of this deponent, a certificate of ten shares of the capital stock of said corporation, standing in the name of Charles H. Fish, which said certificate was then in the possession of said Osborn and endorsed in blank by the said Fish; that on said 28th day of January, this deponent prepared a typewritten draft of the minutes for said meeting of January 29th in the precise words and figures as the same now appear upon said minutes, and directed the said Osborn to call a meeting of the Board of Directors of said company for January 29th, and to take the proceedings and pass the resolutions set forth in said typewritten draft in the precise words and in the same order in which the same appeared in said draft; that deponent was not present at said meeting but after the same was

held the said minute-book was delivered to him for inspection with said minutes written therein in their present form and this deponent believed and still believes that all the proceedings therein set forth were duly and regularly had and taken; that deponent further says that if the contention of said Overton in regard to the irregularity of the proceedings of the Board of Directors at this meeting on January 29th and the meeting on January 31st, 1913, is correct, nevertheless, said irregularity was fully cured by the subsequent election of the identical Board of Directors installed at the said meetings at the [51] stockholders meeting of the Presidio Mining Company held on the 6th day of October, 1913, and by the subsequent proceedings had and taken by said Board of Directors, so duly and legally elected at their meeting held on the 19th day of November, 1913, at which said meeting all financial transactions between the defendant W. S. Noyes and the said Presidio Mining Company were ratified, adjusted and confirmed by the agreement authorized at said meeting and duly made between the said W. S. Noyes and the Presidio Mining Company, which said agreement is dated the 19th day of November, 1913, and is attached to the amended Bill of Complaint herein on file as Exhibit "C."

As to statements of said affidavit beginning at line 28, page 6 and ending line 16 page 8 thereof, this deponent says: that said matters therein contained are fully answered and set forth in the affidavit of W. S. Noyes, filed herewith; that this deponent has read the said affidavit and hereby adopts same

for the purpose of answering said portion of said plaintiff's affidavit.

Deponent says it is true that Wm. S. Noyes has been paid by the Presidio Mining Company, the sum of \$3650 on November 15th, 1915, and the further sum of \$2556.60 on or about the 1st of December, 1915, and states that said sums were rightfully due to said Wm. S. Noyes for ore delivered under the provisions of the said contract between the said Noyes and the Presidio Mining Company, dated November 19th, 1913.

The deponent further states that no sums whatsoever will be paid to the said W. S. Noyes by the Presidio Mining Company except such as are or may become due the said W. S. Noyes under and by virtue of said contract or such sums as may rightfully become due to him as salary from the said Presidio Mining Company. [52]

Referring to the statements contained in said affidavit of W. S. Overton that the defendants and particularly the said W. S. Noyes will continue to draw large sums of money from the Company's treasury to the detriment and injury of the plaintiff and other minority stockholders of said company, this deponent says: That no moneys have been or will be paid to the said W. S. Noyes to the detriment or injury of the plaintiff or the minority stockholders and further states that for every dollar which has heretofore been paid to the said W. S. Noyes on account of ore purchases, one dollar of net profits from ores so purchased from the said W. S. Noyes has gone into the treasury of the said Presidio Mining Com-

pany to the great benefit and advantage of each and all of the stockholders of the said Presidio Mining Company and in this regard, deponent states, that the said contract with the said W. S. Noyes has been of great value to the said Presidio Mining Company and that up to the first day of November, 1915, said Presidio Mining Company has made a net profit out of the said contract amounting to \$105,398.80; that said plaintiff is well aware of said fact but in all of his pleadings in this suit and in all the affidavits filed therein, has carefully concealed said fact from this court.

And further deponent saith not.

(Signed) B. S. NOYES.

Subscribed and sworn to before me this 16th day of December, 1915.

[Notarial Seal]

FLORA HALL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 16, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within affidavit is hereby admitted this 16th day of December, 1915.

WM. F. ROSE and
BRUCE GLIDDEN,
Attorneys for Plff. [53]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom, in the city and county of San Francisco, on Tuesday, the 28th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 196—EQUITY.

W. S. OVERTON et al.

vs.

PRESIDIO MINING CO. et al.

(Order Denying Application for the Appointment of Receiver, Without Prejudice, etc.)

Defendants' motion to dismiss the amended bill of complaint and motion to strike out parts of the amended bill of complaint and plaintiffs' application for the appointment of a receiver and application for a preliminary injunction, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said motion to dismiss and said motion to strike out be and the same are hereby denied; that said application for the appointment of a Receiver be and the same is hereby denied, without prejudice; and that said application for a preliminary injunction be and the same is hereby granted; a formal order for said injunction to be submitted to the Judge for signature and filed. [54]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYÉS, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Motion to Produce Documents and for Order of
Inspection.**

Now come the complainants above named in the
above-entitled suit, and move the Court for an order
that the defendants above named produce for the
inspection and examination by complainants herein
the following documents, and allow complainants to
make copies thereof, to wit:

1. All original letters written by complainant W.
S. Overton and other stockholders from time to time
since 1908 to date hereof to the officers of the Pre-
sidio Mining Company.

2. All letters and telegrams from E. M. Gleim
sent from Shafter, Texas, or Marfa, Texas, to Wm.
S. Noyes or other officials of Presidio Mining Com-
pany, and copies of all telegrams and letters sent
by Wm. S. Noyes or other officers of Presidio Min-

ing Company to E. M. Gleim, since on or about March 24, 1915, to date hereof, relative to any and all matters pertaining to requests for information by W. S. Overton as to the affairs of the Presidio Mining Company, either in San Francisco or Shafter, Texas, or in any way connected with or relating to any and all matters pertaining to the prosecution of this suit since its commencement to date hereof, or pertaining in any way to the visits of W. S. Overton to said mine in Shafter, Texas, or otherwise relative to said W. S. Overton, one of the complainants [55] in this suit, and all instructions given by W. S. Noyes to E. M. Gleim relative to the production of ores produced from either Section 5 or Section 8, or the tabulations derived from assay sheets or superintendent's tally sheets, or instructions given relative to assay sheets, made at said mine in Shafter, Texas.

3. Copies or originals of all letters and correspondence and messages of every kind and nature between W. S. Noyes and the officials of the Presidio Mining Company from November, 1912, to date hereof, relative to the purchase and acquirement of Section 5.

4. Copies of all United States Internal Revenue reports and United States income tax statements and returns relative to the financial affairs and earnings of Presidio Mining Company since 1911.

5. For an order granting to the complainants in this suit, or either of them, or to any agent for and on behalf of said complainants, or either of them, permission to inspect and have access to,

make copies of, all books, records, documents and files of every kind and nature belonging to the said Presidio Mining Company or pertaining to its affairs, either in the office of said corporation in San Francisco or at the office of said corporation at Shafter, Texas, or elsewhere, either within or without the State of California, or pertaining to any matters connected with Section 5, either directly or indirectly.

6. For an order from this Honorable Court directed to the officers of the Presidio Mining Company, Wm. S. Noyes, the Thiel Detective Agency at El Paso, Texas, the officers, agents, servants and employees of either or any of the foregoing mentioned in this paragraph, granting to and permitting the complainants, [56] or either of them, or their agents, servants or employees, to inspect and take copies of all Thiel or other detective agency reports in the office of the Presidio Mining Company in San Francisco or Shafter, Texas, or in the office of Wm. S. Noyes, or in the office of Thiel Detective Agency in El Paso, Texas, or any office of Thiel Detective Agency, or any other detective agency, or elsewhere, for the period from November, 1912, to date hereof, and pertaining to the Presidio Mining Company affairs, and any employee or officer thereof, or any stockholder, past or present, of said Presidio Mining Company.

This motion will be based upon notice, upon the affidavit of W. S. Overton, and upon all the records and files in this case, and upon such oral and documentary proof as may be required.

Dated January 24, 1916.

WM. F. ROSE,
Solicitor for Complainants.
WM. F. ROSE and
BRUCE GLIDDEN,
CHARLES CLYDE SPICER,
Of Counsel.

[Endorsed]: Filed Jan. 25, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

In the District Court of the United States, in and
for the Northern District of California,
Second Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,
vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,
Defendants.

Affidavit of W. S. Overton in Support of Motion.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. S. Overton, being first duly sworn, on oath
deposes and says: That he is one of the complain-
ants in the above-entitled suit, and has at all times

mentioned in the original and amended bills of complaint been a stockholder, and still is a stockholder of the Presidio Mining Company; that since the commencement of this suit deponent has made demand upon the Secretary of said Presidio Mining Company, in its San Francisco office, to produce the complete files of correspondence containing his own and other stockholders' letters written to the San Francisco offices of the Presidio Mining Company from time to time since on or about the year 1906, and has likewise demanded that said Secretary produce the replies to said letters written by said San Francisco officers of said company; that the officials of said Presidio Mining Company have produced a portion of said correspondence, but not all. [58]

That on or about the 5th day of November, 1915, deponent went to Presidio County, Texas, solely to examine the books, records, documents and papers of said Presidio Mining Company kept at its mine office in said county and state, and applied to E. M. Gleim, superintendent of said corporation, for permission to examine the same; that said E. M. Gleim refused to allow deponent to examine any of the books, records, documents, or papers of said company, and informed deponent that, acting under orders from B. S. Noyes, President of said company, he absolutely refused to allow this deponent to examine any of the same; that the said office in Texas disburses large sums of money, aggregating from fifteen to twenty thousand dollars monthly.

That certain of the defendants above named, and

particularly Wm. S. Noyes and B. S. Noyes, have originals and copies of correspondence and communications had between themselves and certain of the stockholders of the Presidio Mining Company, covering a period from November, 1912, to February 1, 1913, relative to and connected with the purchase of Section 5; that no copies thereof or originals are to be found in the San Francisco office of said Presidio Mining Company; that defendant Wm. S. Noyes, and also B. S. Noyes, carry on a general correspondence with E. M. Gleim, the superintendent of the mine at Shafter, Texas, much of which pertains to the company's affairs, and some pertains to the relations of deponent in his efforts to obtain access to the books and records of this corporation both in the San Francisco office and in the Texas office of said company; that this deponent at all times since on or about November 5, 1915, has been refused access to all books and records of said company in the Texas office, and has also been refused access to and has not been permitted to see practically any of the correspondence passing [59] between E. M. Gleim and the San Francisco officers of said Presidio Mining Company other than about routine matters.

That on or about November 4, 1915, deponent went to the office of the Thiel Detective Agency in El Paso, Texas, and was informed that copies of reports made for the Presidio Mining Company were on file in said office; that the official then in charge of said office informed deponent that they had all the copies of the said detective reports made for said Presidio Mining Company, but could not

permit inspection by deponent without authority from the proper officers of the Presidio Mining Company, or a proper Court order; this deponent has on numerous occasions requested the officers of Presidio Mining Company for authority to inspect the Thiel Detective Agency reports, and has demanded of said officials, particularly the President, B. S. Noyes, for copies of Thiel and other detective agency reports relative to the Presidio Mining Company and its affairs and the officers and employees of said company, and for which said corporation has paid over six thousand dollars; that deponent has at all times been refused permission to see or inspect any of said reports.

That deponent has requested the officers of said Presidio Mining Company to furnish him copies of the United States Internal Revenue reports and income tax returns; that no copies thereof are on file in said company's office in San Francisco; that deponent has unsuccessfully tried for a period of more than five months last past to obtain from the officers of this corporation, and particularly from B. S. Noyes, President, copies of the income tax returns of said Presidio Mining Company.

That the production of all letters, documents, books and papers of said Presidio Mining Company, both in San Francisco and in Shafter, Texas, and elsewhere, whether in or out of the [60] office of said Presidio Mining Company, is necessary in order that this deponent may effect a thorough and systematic inspection thereof; that deponent at all times since the commencement of this suit has with-

out success requested the officers of said Presidio Mining Company to be permitted fully to inspect all documents, books, files and records in their possession or under their control, both in San Francisco and in Texas; that all of said books, papers, documents and records are necessary and material evidence in complainants' suit; that all of said facts are known to the defendants above named.

And further deponent sayeth not.

W. S. OVERTON.

Subscribed and sworn to before me this 25th day of January, A. D. 1916.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within affidavit is hereby admitted this 25th day of January, 1916.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Defendants.

[Endorsed]: Filed Jan. 25, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Order to Produce and Allow Inspection of
Documents.**

The motion of complainants for an order to allow
inspection having been argued and submitted on
February 31, 1916, IT IS HEREBY ORDERED:

That the officers, agents and employees of Pre-
sidio Mining Company permit W. S. Overton and
one accountant, during reasonable business hours
to inspect or make copies of any and all books,
records, correspondence, telegrams, documents and
files of the Presidio Mining Company, at its offices,
either in San Francisco, California, or Shafter,
Texas, pertaining either to the business of Section
Eight or Section Five, and whether connected di-
rectly or indirectly with either of said Sections;

To allow inspection by said W. S. Overton of any
and all correspondence between November 1, 1912,
and March 1, 1913, and had by and between Wm. S.

Noyes and other stockholders of Presidio Mining Company relative to the purchase of Section Five; also all correspondence and telegrams passing between the officers of said Presidio Mining Company in San Francisco and E. M. Gleim in Shafter, Texas, relative to the production of [62] ores from Section Five and Section Eight;

That the President of said Presidio Mining Company procure forthwith, or furnish forthwith to said W. S. Overton an authorization to procure, from the proper United States Internal Revenue officers copies of the internal revenue reports and income tax returns as made by the Presidio Mining Company, for the year 1911, and the succeeding years to date hereof; such reports to be placed on file in the office of the company at San Francisco;

That the President and General Manager of said Presidio Mining Company furnish forthwith to W. S. Overton an authorization directed to the Thiel Detective Agency of El Paso, Texas, or any other detective agency, directing and authorizing said Thiel or other detective agency to allow said W. S. Overton, or his attorney, to examine any and all detective reports made by said Thiel or other detective agency since November, 1912, to date hereof, relative to the business of the Presidio Mining Company or any of its officers, agents, or employees, and paid for by said corporation.

Done in open Court this 11th day of February, 1916.

[Seal]

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 11, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Motion for Injunction Pendente Lite.

To the Honorable, the Judge of the District Court
of the United States, in and for the Northern
District of California, Second Division:

Now comes W. S. Overton and Carl A. Martin,
complainants in the above-entitled suit, by Wm. F.
Rose, one of complainants solicitors, and move
the Honorable Court to grant a writ of injunction
against the defendants, and each of them, their
agents, attorneys, clerks, servants and employees,
restraining and prohibiting said defendants, or
either or any one of them, and any officer of
Presidio Mining Company, from transferring all
or any of the shares of stock standing in the names

of defendants, or transferees of defendants, on the books of the Presidio Mining Company heretofore and now held in a voting trust, aggregating 87,883½ shares, and also including any and all shares of the capital stock of the Presidio Mining Company held by defendants at the time of the trial of this suit in March, 1916, whether in the names of defendants directly or held by other parties for or on behalf of them, or each or any one of them; that all transfers of stock by defendants or any one of them, since the submission of this suit on August 29, 1916, be set aside; and that [64] said defendants, and any and all transferees of stock from defendants transferred since the trial of this suit in March, 1916, be forthwith compelled to deliver to the Clerk of this Honorable Court all the shares of stock of said defendants and their transferees, including said 87,883½ shares held in said voting trust, subject to the order of and pending final judgment of this Honorable Court, and conformable to the prayer of the amended and supplemental bills of complaint filed in this suit, and based on this motion and notice thereof, and on said amended and supplemental bills, the affidavit of W. S. Overton of even date herewith, and also on all records, files and pleadings in this suit, and on all the oral and documentary evidence heretofore submitted herein.

Dated October 26, 1916.

WM. F. ROSE,

Solicitor for Complainants.

CHARLES CLYDE SPICER,

Of Counsel.

[Endorsed]: Filed Oct. 27, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Affidavit for Injunction.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. S. Overton, being first duly sworn, on oath,
deposes and says: That he is one of the complain-
ants in the above-entitled suit. That during the
trial of this case in March, 1916, defendants in this
suit admitted that a voting trust existed to run
to July 7, 1919. That the stock in said voting
trust aggregates 87,883½ shares, as follows:

L. M. Doherty.....	31956- $\frac{2}{3}$ shares
L. Osborn	25000 "
B. S. Noyes.....	10926- $\frac{5}{6}$ "
Wm. S. Noyes.....	20000 "

That in addition to said 87,883 $\frac{1}{2}$ shares, Wm. S. Noyes held an aggregate of 10,000 shares. That said Wm. S. Noyes immediately prior to the trial of this case purchased 6928 $\frac{2}{5}$ shares of the capital stock of the Presidio Mining Company. That the total number of shares held in said voting trust and by Wm. S. Noyes aggregated 104,811 $\frac{9}{10}$ shares at the subsequent hearing of this case to wit, August 29, 1916. That a copy of said voting trust is attached hereto, marked Exhibit "A," and here referred to. That immediately after the argument and [66] submission of this case on August 29, 1916, and, to wit, on September 6, 1916, Messrs. Klink, Bean & Co., the expert accountants, notified counsel for complainants and defendants of further irregularities in the books of this corporation. That subsequently, and on September 14, 1916, Messrs. Klink, Bean & Co. further referred to certain items of apparent irregularities on the books of this company. That copies of said letters are attached hereto marked Exhibit "B." That on October 2, 1916, a meeting of the stockholders of the Presidio Mining Company was held, and affiant by cumulative voting was made a director of the Presidio Mining Company. That at said meeting Messrs. Klink, Bean & Co. were authorized to investigate the books of this corporation relative to alleged irregularities, and sent to the office of the corporation two copies of a letter dated October 14, 1916, relative to the investigation made by them of the company books. That the said copies of letters were taken by B. S. Noyes, the

President of this company, and withheld from affiant and from the company's files in the office. That on October 21, 1916, affiant was informed by the Secretary of the company, John W. F. Peat, that said report had been made and removed by B. S. Noyes. That affiant immediately demanded that said letters be filed, which was subsequently done. That a copy of said report of Klink, Bean & Co. is attached hereto marked Exhibit "C." That B. S. Noyes, President of this corporation, has testified during the trial of this suit in this court that he himself had checked all of the existing books of this corporation, and that the said books were correct. Said B. S. Noyes also testified that the books of this company had been audited by Stewart, Casey & Gibon, and a verbal report rendered to him. That it appears from said report of Klink, Bean & Co. that other shortages, aggregating over \$2500.00, [67] in addition to \$10,689.-75 existed in the company's funds, and that the same appears on the books of this corporation. That affiant believes and so avers, that B. S. Noyes has at all times immediately prior to and since the trial of this suit been aware of the said irregularities, evidenced by the Klink, Bean & Co. letter of October 14, 1916.

That on October 21, 1916, Wm. S. Noyes and B. S. Noyes contrary to the terms of the said voting agreement, transferred the stock held pursuant to said voting trust aggregating 87883½ shares as follows:

Cert. 130, 20,000 shares, to Wm. S. Noyes.

Cert. 131, 25,000 shares, to Wm. S. Noyes,
pledgee of L. Osborn.

Cert. 132, 31,956- $\frac{2}{3}$ shares, to L. M. Doherty.

Cert. 133, 10,926- $\frac{5}{6}$ shares, to B. S. Noyes.

That said transfers were made contrary to the terms of said voting trust, and without the consent and contrary to the wishes of L. M. Doherty. That the 25,000 shares of stock attempted to be transferred to Wm. S. Noyes represents the stock claimed by Wm. S. Noyes to have been pledged to himself by L. Osborn as collateral security for an alleged and purported loan of \$10,689.75 as testified to during the trial of this action. That the said alleged loan by Wm. S. Noyes to Osborn was the greater part of the sum of \$11,000 ordered paid forthwith pursuant to the so-called \$45,000 bonus resolution. That said \$11,000 is admitted to have been voted for the express purpose of providing funds with which to conceal the Osborn shortage. That affiant believes and avers that the said Wm. S. Noyes has, as is herein set forth, transferred the said 25,000 shares of stock to himself as pledgee for the express purpose and with the intent of using the said stock to transfer to innocent third purchasers or to his friends to prevent any recovery of the said shares of stock and to permit his domination of the affairs of said Presidio Mining Company. [68] That on October 25, 1916, Wm. S. Noyes, with the assistance of B. S. Noyes as President and John W. F. Peat as Secretary, cancelled the said purported transfer of 20,000 shares, Cer-

tificate No. 130, and issued five certificates of 1,000 shares each, numbered 134 to 138 respectively, and transferred 1,000 of said shares, represented by Certificate No. 134, to one Frank M. Parcells. That in addition to said five certificates of 1,000 shares each, said Wm. S. Noyes transferred to himself Certificate No. 139 for 15,000 shares. That affiant believes and avers that the said Wm. S. Noyes and B. S. Noyes transferred said shares of stock for the express purpose of permitting the sale and delivery of said shares from time to time to innocent third purchasers for value, for the express purpose of defeating any of the orders and decrees of this Court to compel restitution by L. Osborn and said Wm. S. Noyes and B. S. Noyes and prevent the recovery of said stock by the Presidio Mining Company in liquidation of any judgment which it might obtain against the defendants, or either or any one of them. That unless restrained, affiant believes and so avers, that the defendants Wm. S. Noyes and B. S. Noyes will continue to transfer the said stock as they have commenced to do, to defeat the ends of justice and cause irreparable injury to the Presidio Mining Company and the complainants in this action, and prevent the enforcement of any claims which said corporation may have against said respective parties, particularly against L. Osborn, should the said stock be continued to be transferred by the said Wm. S. Noyes to other parties or to innocent third purchasers for value. That affiant has accused the said Wm. S. Noyes of wrongfully secur-

ing for his own purposes the stock of L. Osborn, to wit, including 28,607 shares in December, 1912, and 25,000 in February, 1913, in addition to other shares transferred to B. S. Noyes, the brother of [69] Wm. S. Noyes. Attached hereto is a photostat copy of a portion of page 6 of the stock journal of the Presidio Mining Company showing the signatures of Wm. S. Noyes, B. S. Noyes and Frank M. Parcells on the books of this company, and evidencing recent attempted transfers of stock in October, 1916.

That affiant believes and so avers, that the said Wm. S. Noyes and B. S. Noyes, unless restrained from so doing, will attempt to control this corporation in the future in spite of any Court orders, decrees or judgments which might be made and rendered by this Court, by acting through transferees to whom said stock above mentioned may be transferred, and defy any orders of Court or evade any judgment which may be rendered against them or L. Osborn in this action. That the said Wm. S. Noyes did, two days after the commencement of this suit, to wit, on or about July 28, 1915, record a deed from himself to his wife on the property and home in which he now and for a number of years last past has resided in the city of Oakland. That affiant at all times has heretofore believed that the said Wm. S. Noyes and B. S. Noyes were responsible and able to respond on execution to any judgment which might be rendered against them, for the sole reason that the said stock of Wm. S. Noyes and B. S. Noyes was largely held

in this voting trust, represented by certificate 104. That if said defendants Wm. S. Noyes and B. S. Noyes and L. Osborn are permitted to transfer said stock now or in the future, and until the final judgment of the Court in this suit, that no judgment can be enforced against the said stock to satisfy any claims of the Presidio Mining Company against said last-named defendants. That in the opening brief heretofore filed by affiant's counsel on behalf of complainants, said counsel as a part of the proposed remedies in the suit has requested that the stock of the defendants [70] be deposited with the Clerk of this Honorable Court pending any final judgment which may be rendered herein. That unless an injunction issue, and said defendants be restrained from in any way transferring or attempting to transfer their said stock held in said voting trust or otherwise, and that said stock be sequestered pending the final judgment of this Court, that irreparable damage and injury will result to the Presidio Mining Company and the enforcement of any judgment so far as its satisfaction from the levy on any of said stock is concerned, will be defeated. Affiant believes and avers, that the said defendants, particularly Wm. S. Noyes and B. S. Noyes have, without the consent of L. M. Doherty and contrary to the provisions of said voting trust, willfully transferred and are preparing to further transfer the said shares of stock in the said voting trust and otherwise, for the express purpose of defeating any order and

judgment which may be rendered in this action.
And further affiant sayeth not.

W. S. OVERTON.

Subscribed and sworn to before me this 26th day
of October, 1916.

[Seal]

L. H. ANDERSON,

Notary Public in and for the City and County of
San Francisco, State of California. [71]

Exhibit "A."

WHEREAS, WILLIAM S. NOYES is the owner of 20,000 shares, standing in his name, of the capital stock of PRESIDIO MINING COMPANY, a corporation organized and existing under the laws of the State of California; L. M. DOHERTY is the owner of 31,956-2/3 shares of said stock standing in her name; L. OSBORN is the owner of 25000 shares of stock standing in his name; and B. S. NOYES is the owner of 10,926-5/6 shares of said stock standing in his name, and

WHEREAS it is deemed to be for the best interest of the parties above-named and of said corporation, that there should be no change in the control thereof or in the management of said company's business for the period of five (5) years,

IT IS THEREFORE AGREED by and between the above-named parties as follows:

That all of said stock shall be, and the same is hereby, sold, assigned, transferred and set over unto WILLIAM S. NOYES and L. M. DOHERTY

as trustees, to hold upon the following trusts, to wit:

I. To vote upon said stock at all stockholders' meetings, whether regular or called, of said corporation, for the period of five (5) years from and after the date hereof. The votes of said stock and all thereof, shall be cast by the said two trustees, but if either of them shall be absent from any meeting, said votes may be cast by the other trustee.

II. To collect and receive, for said period of five (5) years any and all dividends that may be declared by said corporation upon said stock and all thereof, and to distribute such dividends among the parties hereto in proportion to their respective interests.

III. At the expiration of five (5) years from the date hereof to transfer said stock to the names of the respective parties hereto in the amounts to which each is entitled and to distribute said stock in those proportions, among the parties hereto and to close this trust.

IT IS AGREED that sales of said stock by the respective parties hereto, may be made, subject to the exercise of the voting power as herein provided.

IT IS FURTHER AGREED, that in the event of the death of any of the parties hereto, the stock of such deceased party shall pass to his heirs or personal representatives subject to provisions hereof.

IT IS FURTHER AGREED that this agreement may be dissolved at any time by the unanimous consent of all the parties hereto.

Executed this seventh day of July, 1914.

(Signed) L. M. DOHERTY.

(Signed) L. OSBORN.

(Signed) WM. S. NOYES.

(Signed) B. S. NOYES.

I hereby consent to the execution of the foregoing agreement by L. M. Doherty.

(Signed) INDIA SCOTT WILLIS. [72]

San Francisco, Cal., Sept. 30th, 1914.

This is to certify that there are 1956-2/3 shares of the capital stock of the Presidio Mining Company standing in names of William S. Noyes and L. M. Doherty as Trustees upon the books of said company under the provisions of a certain voting trust dated July 7th, 1914.

Further that L. M. Doherty is the equitable owner of said 1956-2/3 shares of stock and the undersigned agree to transfer so many shares of said stock and deliver the same to said Doherty at the expiration of the term mentioned in said voting trust agreement, to wit: the 7th day of July 1919 or at such earlier date as said voting trust agreement may be terminated by the unanimous consent of all the parties hereto.

Signed—WM. S. NOYES,

Trustee.

L. M. DOHERTY,

Trustee.

San Francisco, Cal., Sept. 30th, 1914.

This is to certify that there are 30,000 shares of the capital stock of the Presidio Mining Company standing in names of William S. Noyes and L. M. Doherty as Trustees upon the books of said company under the provisions of a certain voting trust dated July 7th, 1914.

Further, that L. M. Doherty is the equitable owner of said 30,000 shares of stock and the undersigned agree to transfer so many shares of said stock and deliver the same to said Doherty at the expiration of the term mentioned in said voting trust agreement, to wit: the 7th day of July 1919 or at such earlier date as said voting trust agreement may be terminated by the unanimous consent of all the parties hereto.

Signed—WM. S. NOYES,

Trustee.

L. M. DOHERTY.

Trustee. [73]

Exhibit "B"

San Francisco, September 6, 1916.

Mr. R. F. Harding and Mr. W. F. Rose,

San Francisco, California.

Re Presidio Mining Company.

Gentlemen:

In the course of our examination of the accounts and records of the above named company at their San Francisco Office our attention was attracted to several entries which appear to be irregular.

As the above matters did not properly come with-

in the stipulated limits of our investigation, we did not pursue them to a final conclusion, yet we regard them as of sufficient importance to be brought to your attention and will present further details if called upon to do so.

We merely state here that the entries referred to are not any part of the so-called "Admitted Shortage of \$10,689.75."

Yours truly,
KLINK, BEAN & COMPANY,
By G. A. KLINK.

San Francisco, September 14, 1916.

Mr. R. F. Harding and Mr. W. F. Rose,
San Francisco, Cal.

Re Presidio Mining Company.

Gentlemen:

Pursuant to the telephone conversation of yesterday between Mr. Harding and our Mr. Cooper, we herewith submit a memorandum of the particular items which we had in mind when we called attention to entries which seemed to be irregular.

On page 10, Journal #1, October 11, 1906, there is an entry charging Profit and Loss and crediting draft account with \$1,800. The footing on the credit side of draft account in the ledger folio 86, is \$900.00 in excess of the correct amount. The charge to profit and loss is interlined between the entries of May 30th and June 22nd, 1906.

On page 15, Cash Book, March 2, 1914, the following entries appear on the credit side:

Payment of	\$290.15
Check presumably to cover reads..	90.15
Payment of	270.00
Check to cover could not be found.	

We did not go far enough into these matters to come to a final conclusion and think further investigation would be necessary before making a positive statement.

Yours truly,
 KLINK, BEAN & COMPANY,
 By G. A. KLINK. [74]

Exhibit "C."

San Francisco, October 14, 1916.

To the Board of Directors,
 Presidio Mining Company,
 San Francisco, California.

Gentlemen:

Pursuant to instructions we have investigated the following items:

1—Charge to Profit and Loss—Credit to Drafts Account, October 11, 1906...	\$1,800.00
2—Cash Book entries March 2, 1914 of \$290.15 and \$270.00.	
1—A summary of drafts drawn as re- ported by the Superintendent from April, 1906 to August, 1913 amounts to	\$40,994.31
Total credits to Drafts account..	43,694.31
	<hr/>
Difference.	2,700.00

On April 10, 1913, (Journal entries pages 97 and 101) there are two entries of \$450.00 each for General Manager's salary for April credited to drafts account; neither appears in the Superintendent's report. One at least is an over-credit to drafts account, the other may be in order.

Allowing one draft as a credit of	450.00
-----------------------------------	--------

Leaves a net difference in Drafts	
-----------------------------------	--

account of	\$2,250.00
------------------	------------

As all the charges to Drafts account were from cash-book entries, it would appear that, as far as this particular account is concerned, there were payments made in excess of drafts drawn, amounting to . \$2,250.00

Examining into individual transactions we find the following:

Cash Book Entry April 7, 1906.

Drafts — paid Superintendent's drafts No. 294.....	\$450.00
----------------------------------------------------	----------

and No. 295.....	\$450.00	900.00
------------------	----------	--------

Check No. 2211 for \$450.00 drawn in favor of Mr. W. S. Noyes, is on file in the County Clerk's Office, but check No. 2210 was not on file and could not be located.

Cash Book entry March 9, 1909:

Drafts Account—Paid Superintendent's Draft No. 324.....	450.00
Check No. 248 not on file.	
September 30, 1910—Check No. 74, favor W. S. Noyes for.....	450.00
not on file.	
January 3, 1911—Charge to Draft account through Cash Book.....	450.00
No stub in check-book of check to cover.	

We did not pursue the examination of the Draft account any further.

2—These items together amount to \$560,-15, and are said to cover traveling expenses of Mr. W. S. Noyes. If this is so, we have no further comment to make on the subject other than that the [75] voucher covering the disbursement could not be located in the files.

During our examination other items of a doubtful nature were noticed particularly with regard to charges for Secretary's salary. During the year September 1, 1908, to August 31, 1909, fourteen months' salary was charged by Cash Book entries and during the year September, 1909, to August 31, 1910, thirteen months' salary was charged.

W. S. Overton and Carl A. Martin. 93

Total overcharge to salary—3
months at \$300.00..... 900.00

CHECKS MISSING FROM FILES:

It was noticed that the following
checks were not on file:

No. 243—February 11, 1909, favor

Chas. Kerrigan..... 542.50

No. 28—April 28, 1910, favor Ex-
change—San Antonio National Bank 10,002.50

CHECKS NOT ENTERED:

Certified Check No. 14—March 4,
1910, favor Chas. Kerrigan..... 6,000.00

The above three items were not in-
vestigated further.

Charged to Profit and Loss

October, 1913 Credited to Supense 470.00

Mr. W. S. Noyes explains that in order to build
the aerial tramway, it was necessary to get pos-
session of a strip of land which was school property
and could not be owned by a corporation. This
strip was purchased by an outsider and afterwards
transferred to Noyes, in whose name it is at present.

He is now taking the matter up with an attorney
to see if it can legally or safely be transferred to
the Company. The price paid was \$470 which was
charged to Supense and afterward closed into
Profit and Loss.

Yours very truly,

KLINK, BEAN & COMPANY,

By G. T. KLINK [76]

1. Wm. S. Noyes and L. M. Doherty, Trustees,	24	104	87.883 $\frac{1}{2}$	W. S. Noyes,	Wm. S. Noyes	19	130	20000	Wm. S. Noyes
					pledgee of L.				W. S. Noyes
				Wm. S. Noyes	pledgee of L.	19	131	25000	pledgee of L.
				Osborn,					Osborn.
				L. M. Doherty		7	132	31956 $\frac{2}{3}$	
				B. S. Noyes		19	133	10926 $\frac{5}{6}$	B. S. Noyes
25 Wm. S. Noyes	19	130	20,000.	Wm. S. N.	Frank M.				
					Parcells	11	134.	1000	F. M. Parcells
					Wm. S. Noyes	19	135.	1000	
					"	"	19 136.	1000	
					"	"	19 137.	1000	
					"	"	19 138.	1000	
					"	"	19 139.	15000	19000

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Undertaking on Order to Show Cause and Tempo-
rary Restraining Order.**

KNOW ALL MEN BY THESE PRESENTS:
Whereas, an order has been made in the above-enti-
tled cause, dated the 27th day of October, 1916, for
the issuance of a temporary restraining order en-
joining and restraining Wm. S. Noyes, B. S. Noyes,
L. Osborn, John W. F. Peat and L. M. Doherty, de-
fendants, Presidio Mining Company and any officer
thereof, F. M. Parcells and J. D. Ralph, their agents,
servants, employees, representatives and attorneys,
or either or any one of them, from the commission of
certain acts in said order to show cause and tempo-
rary restraining order particularly set forth, upon
the giving and filing of a good and sufficient bond in
the sum of One Thousand Dollars (\$1,000.00);

NOW, THEREFORE, the American Surety
Company of New York, a corporation duly organ-
ized under the laws of the State of New York, and

duly authorized to transact business in the State of California and said Northern District of California, in consideration of the premises hereby undertakes in the sum of One Thousand Dollars, and hereby promises to the effect that the said complainants above named will pay to said Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, L. M. Doherty, Presidio [79] Mining Company, F. M. Parcells and J. D. Ralph, or any of the persons referred to in said temporary restraining order, damages not exceeding the sum of One Thousand Dollars that they or any of the said persons may suffer by reason of the making or issuance of said temporary restraining order, in case it shall be finally determined that said order was improperly granted or issued, and hereby agrees that in case of the breach of any condition hereof, the above-entitled Court may upon notice to it of not less than ten days, proceed summarily in the above-entitled suit to ascertain the amount of which the said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

IN WITNESS WHEREOF, the corporate seal and name of said American Surety Company of New York is hereto affixed, and attested by its duly authorized officers, this 27th day of October A. D. 1916.

AMERICAN SURETY COMPANY OF
NEW YORK.

By H. J. DOUGLAS, (Seal)

Resident Vice-president.

Attest: R. D. WELDON,

Resident Assistant Secretary.

October 27, 1916.

Approved:

BLEDSON,
D. J.

[Endorsed]: Filed Oct. 27, 1916. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[80]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Order to Show Cause and Temporary Restraining
Order.**

Upon reading the affidavit of W. S. Overton, and
on motion of Wm. F. Rose, Esq., solicitor for com-
plainants, and good cause appearing therefor, and
plaintiff having given an undertaking herein duly
approved,

IT IS HEREBY ORDERED: That Wm. S.
Noyes, B. S. Noyes, L. Osborn, John W. F. Peat,
and L. M. Doherty, defendants, Presidio Mining

Company, and any officer thereof, F. M. Parcels, J. D. Ralph, and each of said parties, show cause, if any they have, before the Judge of this court in the courtroom of Division 2, Federal Building, Seventh and Mission Streets, San Francisco, Northern District of California, on the 6th day of November, 1916, at 10:00 o'clock A. M., or as soon as counsel can be heard, why an injunction should not issue preventing the above-named parties, their agents, employees, servants, representatives, or attorneys, from transferring any of the capital stock of the Presidio Mining Company heretofore or now held by said respective parties or their transferees, and also to further show cause why said respective parties, transferees, agents or attorneys, should not be compelled to deposit with the Clerk of this court any and all shares of stock of said Presidio Mining Company standing in the name of defendants [81] on the books of this company at the time of the trial of this suit in March 1916, whether held in that certain voting trust aggregating 87,883½ shares or otherwise, and subsequently transferred to, by or through any of the above-named parties, pending the final judgment of this Court.

IT IS FURTHER ORDERED, that the said above-named parties and each of them, their agents, servants, employees, representatives, or attorneys, are temporarily restrained, and each of said parties is hereby ordered to refrain from transferring, directly or indirectly, all or any of the shares of the capital stock of the Presidio Mining Company standing in the names of said above-named parties,

or either or any of them, whether held in that certain voting trust aggregating 87,883½ shares entered into July 7, 1914, by and between defendants first above named, and also any and all other shares of the capital stock of Presidio Mining Company held by defendants, or either or any one of them, directly or indirectly, at the time of the trial of this suit in March, 1916, and subsequently transferred on the books of Presidio Mining Company, or otherwise, by, to or on behalf of any of the hereinabove named parties, directly or indirectly, pending the further order of this Court.

Dated October 27, 1916.

BENJAMIN F. BLEDSOE,
Judge.

[Endorsed]: Filed Oct. 27, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[82]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,

Defendants.

Undertaking on Injunction Pendente Lite.

KNOW ALL MEN BY THESE PRESENTS:

Whereas, an order has been made in the above-entitled cause dated the 12th day of December, 1916, for the issuance of an injunction *pendente lite* enjoining and restraining defendants Wm. S. Noyes, B. S. Noyes, and L. Osborn above named, their and each of his agents, servants, employees, representatives and attorneys, and all other persons acting in aid of them, or either or any one of them, from the commission of certain acts in said order particularly set forth, and commanding said parties to deposit an aggregate of 59,544 $\frac{5}{6}$ shares of the capital stock of the Presidio Mining Company with the Clerk of the above-entitled court and in said suit, upon the giving and filing of a good and sufficient bond in the sum of Two Thousand Five Hundred Dollars (\$2,500.00);

NOW, THEREFORE, the American Surety Company of New York, a corporation duly organized under the laws of the State of New York, and duly authorized to transact business in the State of California and said Northern District of California, in consideration of the premises hereby undertake in the sum of Two Thousand Five Hundred Dollars (\$2,500.00) and hereby promise to [83] the effect that the said complainants above named will pay to the said defendants, Wm. S. Noyes, B. S. Noyes or L. Osborn, or any of the persons referred to in said injunction *pendente lite*, in damages not exceeding the sum of \$2,500.00, that they or any of the said persons may jointly or severally

suffer by reason of the making or issuance of said injunction *pendente lite*, in case it shall be finally determined that said injunction was improperly granted or issued, and hereby agrees that in case of the breach of any conditions hereof, the above-entitled Court may upon notice, to wit, of not less than ten days, proceed summarily in the above-entitled suit to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

IN WITNESS WHEREOF, the corporate seal and name of said American Surety Company of New York it hereto affixed, and attested by its duly authorized officers, this 12th day of December, A. D. 1916.

AMERICAN SURETY COMPANY OF
NEW YORK.

By H. J. DOUGLAS. (Seal)

Attest: D. ELMER DYER,
Resident Assistant Secretary.

December —, 1916.

Approved:

W. B. MALING,
Clerk.

[Endorsed]: Filed Dec. 12, 1916. Walter B. Maling, Clerk. [84]

(Title of Court and Cause.)

Injunction Pendente Lite.

United States of America,

Northern District of California,—ss.

The President of the United States of America, to
Wm. S. Noyes, B. B. Noyes, and L. Osborn,
Their and Each of His Agents, Servants, Em-
ployees, Representatives or Attorneys, and Each
of Them, GREETING:

Whereas, on this 12th day of December, A. D. 1916, an order in the above-entitled court and suit was made, directing that an injunction *pendente lite* issue herein, and wherein and whereby it was ordered, adjudged and decreed that Wm. S. Noyes, B. S. Noyes and L. Osborn, and their and each of his agents, servants, employees, representatives or attorneys, and each of them, be enjoined and restrained from transferring to any persons whomsoever all or any portion of a total aggregate of 59,544 $\frac{5}{6}$ shares of the capital stock of the Presidio Mining Company held by L. Osborn in December, 1912, pending the determination of this suit, and also that said respective parties deposit with the clerk of this court a total of 59,544 $\frac{5}{6}$ shares of said capital stock;

Now, therefore, in accordance with the terms of said order directing that an injunction *pendente lite* issue in said suit, we hereby strictly command [85] and enjoin you, and each of you, the said Wm. S. Noyes, B. S. Noyes and L. Osborn, you and each of your agents, servants, employees, repre-

sentatives or attorneys, and all persons acting in aid of you, or either or any one of you from transferring, directly or indirectly, all or any part or portion of said aggregate number of 59,544 5/6 shares of the capital stock of the Presidio Mining Company, and we do hereby further strictly command and enjoin the Presidio Mining Company, its officers or agents, directly or indirectly to refrain from transferring all or any part or portion of said 59,544 5/6 shares of the capital stock of said company and we likewise hereby command that you and each of you forthwith deposit with the Clerk of this court the following shares of stock now standing in the names of the following parties:

Cert. No. 131, dated Oct. 21, 1916,

Wm. S. Noyes, Pledgee of L. Os-

born 25,000 shares

Cert. No. 134, dated Oct. 25, 1916,

Frank M. Parcells 1,000 shares

Cert. No. 135, dated Oct. 25, 1916,

Wm. S. Noyes 1,000 shares

Cert. No. 136, dated Oct. 25, 1916,

Wm. S. Noyes 1,000 shares

Cert. No. 137, dated Oct. 25, 1916,

Wm. S. Noyes..... 1,000 shares

Cert. No. 138, dated Oct. 25, 1916,

Wm. S. Noyes 1,000 shares

Cert. No. 139, Dated Oct. 25, 1916,

Wm. S. Noyes 15,000 shares

And in addition to said 45,000 shares, that Wm.

[86] S. Noyes deposit 8,618 shares, and B. S. Noyes 5,926 5/6 shares, pending the determination

of this suit; which commands and injunction you and each of you are respectively required to observe and obey until other or further orders of said District Court shall be made in the premises.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 12th day of December, in the year of our Lord one Thousand nine hundred and sixteen, and of our Independence the one hundred and forty-first.

[Seal]

WALTER B. MALING,

Clerk.

(Return on Service of Writ.)

United States of America,
Northern District of California,—ss.

I hereby certify and return that, I served the within injunction *pendente lite*, on the herein named, Wm. S. Noyes, B. S. Noyes and Frank M. Parcels, each by handing to and leaving a true and certified copy thereof with, Wm. S. Noyes, B. S. Noyes, and Frank M. Parcels, each personally at San Francisco, California, in said District on the 12th day of December, A. D. 1916.

J. B. HOLOHAN,

United States Marshal,

By Lawrence J. Conlon,

Office Deputy.

[Endorsed]: Filed Dec. 13, 1916. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[87]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

No. 196.—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WILLIAM S. NOYES, B. S. NOYES, L.
OSBORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Master's Report on Accounting.

To the Honorable, the Judge of the above-entitled Court:

The report of H. M. Wright, Standing Master in Chancery of said court, respectfully shows as follows:

On February 16, 1918, there was entered in the above-entitled court and cause an interlocutory decree containing findings as to the issues, and an order of reference to the undersigned in terms as hereinafter set forth. Thereafter, on March 6, 1918, the Master made his order requiring the defendants within a time stated to file with him a statement of account in writing responsive to the interlocutory decree, and as specifically required in said order. The said order of the Master is herewith separately returned. Thereafter, on April 1, 1918, the said defendants other than the Presidio

Mining Company, by their attorneys, R. T. Harding, Esq., Henry E. Monroe, Esq., and J. J. Dunne, Esq., filed a written account in response to the Master's order, which statement of account is also separately returned, together with two bundles of vouchers thereof, described as Exhibit "A" and Exhibit "B." [88]

On June 24, 1918, the taking of evidence upon said accounting was begun before the Master, William F. Rose, Esq., appearing for plaintiffs, and R. T. Harding, Esq., and J. J. Dunne, Esq., for defendants other than Presidio Mining Company, and the said taking of evidence continued from day to day until August 23, 1918. Thereafter, on August 27, 1918, the cause was orally argued by counsel, with leave to file points and authorities thereafter, and this was done. During the said hearing there were read in evidence the depositions of James D. Shannon, E. G. Gleim, E. M. Gleim and H. B. Young, the depositions of George A. Chavez, E. G. Gleim, F. R. Russell and G. W. Gleim, and also the depositions of Spencer Gregg. There were also received in evidence documentary exhibits marked as Plaintiffs' Exhibits 1 to 42, inclusive, and Defendants' Exhibits "A," "B," etc., to "I," inclusive. The transcript of testimony will show that the parties also offered in evidence certain files already of record in this case. I herewith separately return said transcript of testimony in twelve pamphlet volumes reported by Charles R. Gagan and Edward W. Lehner, Official Reporters of this Court; also the said exhibits and said depositions.

The said defendants' account, said testimony, depositions and exhibits and the said files of the original case (including the Master's official knowledge as to certain expenses of suit in the Master's office herein referred to) constitute all the evidence, other than that gained by personal observation of the witnesses at the hearing, upon which this report is based.

Before proceeding with the statement of account, and for a better understanding of its findings and conclusions, I make brief reference to the nature of the suit and to the findings in the interlocutory decree. It is a stockholders' suit brought by minority stockholders against the corporation, and [89] against individuals controlling it adversely to the minority stockholders. The decree adjudges in complainants' favor that the individual defendants were guilty of conspiracy and of fraud against the company and its minority stockholders. It finds that W. S. Noyes illegally obtained benefits for himself in various ways while in a fiduciary relation to the company; that defendant Osborn, while secretary, had embezzled its moneys; that various resolutions and transactions entered into during the period of majority control were fraudulent and void. It finds that a transaction whereby William S. Noyes obtained adjoining mining property referred to herein as Section 5 was a fraud upon the company, and was held in trust for the company; that certain transactions in 1913, including a lease of Section 5 to the Presidio Mining Company, a bonus resolution awarding Noyes \$45,000 as a bonus

for getting the lease, and a further contract merging the prior ones and providing that Noyes should be paid one-half of the net proceeds of the ore from Section 5 were all illegal, fraudulent and void, and were set aside. Among other things, the transaction by which Noyes obtained money from the company under these fraudulent contracts, paid over certain sums as received to Osburn, who, by concealed entries, made good his embezzlement and gave to Noyes a promissory note and the pledge of his stock, whereby Noyes achieved control of the company, were all held collusive and fraudulent transactions; the Osborn note to Noyes was required to be delivered to the clerk of the court subject to the Court's order; the stock pledged and other stock was required to be deposited in court awaiting final decree. The accounting orders covers all these matters, together with excessive salaries, etc.

The extent of the Master's authority is, of course, defined by the terms of the interlocutory decree. There are many specific directions, followed by a general direction. My plan will [90] be to quote, first, the general direction for the accounting, and to quote the specific directions, not necessarily in the order in which they occur, followed in each case with the findings and conclusions as to the specific matters referred to. I may say that at the hearing I was in some doubt as to the scope of the reference, and so expressed myself. This doubt arose out of the terms of the order of reference in the decree as prepared by counsel,

making it uncertain in certain cases whether I was to make findings. It will be observed, however, that before signing the decree Judge Van Fleet inserted, as will appear hereafter, the words "and findings," from which action, on full consideration, I have concluded that I am directed to find as to all matters specifically referred to, except certain things specifically reserved for the Court upon the coming in of the master's report. The general order of reference is as follows (decree, page 8):

"It is further ordered, adjudged and decreed, that an accounting be had herein and said matter is hereby referred to H. M. Wright, the Standing Master in Chancery of this court, for full investigation and accounting as herein indicated, pursuant to law and the rules of this court in such cases made and provided; * * * that said Master in Chancery report the evidence taken or used before him to this Court, together with his opinion and findings (underscored words inserted by and initialed "Van Fleet, J.") thereon."

1. Section 5. (Decree, page 6:)

"That William S. Noyes account for all sums of money found by the Master as received by said William S. Noyes on account of Section 5, together with interest thereon, at the rate of 7 per cent per annum from dates of receipt of the several amounts so received by him from the Presidio Mining Company, in addition to his salary, since January 1, 1913." [91]

(Decree, pages 7-8:)

"That said William S. Noyes be credited with the

purchase price of Section 5, together with interest thereon, at the rate of 7 per cent per annum, from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of 7 per cent per annum from dates of application.”

In the account which follows, I have found, first, the debit items which are actual cash received from the Presidio Mining Company's treasury by William S. Noyes from January 1, 1913 to date, including interest on said sums from date of receipt to November 30, 1918, the date when this report will be finally settled and filed with the clerk of the court. I omit from the debit items a certain item referred to in Noyes' statement of account under date of October 8, 1913, in the sum of \$3500. This date is admittedly wrong, and should be September 6, 1913. Noyes signed a credit voucher acknowledging receipt of \$3500 on account of one of the contracts which has been found to be void, and turned it over to Osborn to apply, by appropriate bookkeeping entries, on account of his embezzlement. Since the latter transaction on both sides has been declared fraudulent by the Court, I omit this sum, both as a debit and a credit, and leave Osborn's debt to the company in that amount unimpaired. Of course, if the interlocutory decree should be hereafter modified or reversed on appeal, the accounting in this and in various other respects will be affected. In the credits I have included

amounts paid on account of the purchase of Section 5 which are accepted by the complainants as rendered by the defendants in their account and also taxes on those lands paid by Noyes. I have excluded from the credit items two items, namely, May 13, 1914, \$218.15, and [92] and January 24, 1915, \$193.34, being the extent to which W. S. Noyes' income tax was affected by money received by him from the Presidio Mining Company. These are not moneys paid by him "for the use and benefit of said Presidio Mining Company." The Presidio Mining Company must have paid a tax upon this money as income, and if it had remained, as it should have, money on hand, they might have paid a personal property tax to that extent; I have no means of determining what amount. I have also added as a credit two sums of \$5,000 and \$5,689.75, respectively, paid by Noyes in February and March, 1913, to Osborn and by him applied in partial satisfaction of sums embezzled. The Court in effect has treated this sum as money returned to the company by Noyes, leaving the indebtedness of Osborn unaffected.

I find the account as regards Section 5 as follows:

DEBITS.

1913.

February 24	\$11,000.00
7% Interest to Nov. 30, 1918, 5 yrs.,	
9 months, 4 days.....	4,440.32
February 28	276.50
Int. 5 years, 9 months, 2 days.....	111.23

March 21	5,000.00
Int. 5 years, 8 months, 9 days.....	1,990.10
April 23	447.35
Int. 5 yrs., 7 months, 7 days.....	175.17
May 9	352.25
Int. 5 years, 6 months, 21 days.....	136.86
May 15	1,000.00
Int. 5 years, 6 months, 15 days.....	387.83

Forward.....\$25,317.61

[93]

1913 Bro't Forward.....\$25,317.61

August 31	458.00
Int. 5 years, 3 months.....	168.04
October 1	3,000.00
Int. 5 years, 2 months.....	1,085.00
October 14	1,000.00
Int. 5 years, 1 month, 16 days.....	359.87
October 27	469.50
Int. 5 years, 1 month, 3 days.....	167.33
December 30	3,485.90
Int. 4 years, 11 months.....	1,199.72

1914.

January 2	1,500.00
Int. 4 years, 10 months, 28 days.....	515.62
March 7	1,000.00
Int. 4 years, 8 months, 23 days.....	331.01
July 3	1,000.00
Int. 4 years, 4 months, 27 days.....	308.45
September 26	734.50
Int. 4 years, 2 months, 4 days.....	214.70

1915.

February 8	190.00
Int. 3 years, 7 months, 22 days.....	50.46
March 10	2,000.00
Int. 3 years, 8 months, 20 days.....	521.82
May 1	3,786.20
Int. 3 years, 7 months.....	949.69
June 29	5,035.20
Int. 3 years, 5 months, 1 day.....	1,204.68
July 20	6,075.05
Int. 3 years, 4 months, 10 days.....	1,429.31

Forward.....\$63,557.66
[94]

1915. Bro't Forward.....\$63,557.66

September 20	5,819.15
Interest, 3 years, 2 months, 10 days....	1,301.21
November 15	3,650.00
Interest, 3 years, 15 days.....	777.14
December 2	2,556.60
Interest 2 years, 11 months, 28 days....	535.93

Total Debits.....\$78,197.69

CREDITS.

1913.

January 25	\$16,786.66
Interest, 5 years, 10 months, 5 days....	6,870.84
February 28	679.00
Interest, 5 years, 9 months, 2 days....	273.25
March 3	5,000.00
Interest, 5 years, 8 months, 27 days....	2,001.77
March 29	1,243.67

Interest, 5 years, 8 months, 1 day.....	493.71
May 15	200.00
Interest, 5 years, 7 months, 15 days....	78.79
August 31	75.00
Interest, 5 years, 3 months.....	27.57
September 18	25.00
Interest, 5 years, 2 months, 12 days....	10.07
February 25, Osborn.....	5,000.00
Interest, 5 years, 9 months, 5 days....	2,017.23
March 1, Osborn.....	5,689.75
Interest, 5 years, 9 months.....	2,189.98
March 31	186.77
Interest, 5 years, 8 months.....	79.75
1914.	
February 12	190.88
Interest, 4 years, 9 months, 18 days....	64.04
1915.	
January 24	245.75
Interest, 3 years, 10 months, 6 days....	66.27
1916.	
January 12	197.59
Interest, 2 years, 10 months, 18 days...	39.88
1917.	
Dec. 19	269.00
Interest, 11 months, 11 days.....	17.77

Total Credits..... ..\$50,019.99

[95]

RECAPITULATION.

Total Debits, November 30, 1918	\$78,197.69
Total Credits, November 30, 1918	50,019.99

Balance due, November 30, 1918... \$28,177.70

I find, accordingly, a balance due on November 30, 1918, from W. S. Noyes to the Presidio Mining Company of \$28,177.70.

II. SALARIES.

The decree finds that:

“The resolutions relative to salaries and increases thereof and payments made thereunder from the treasury of the Presidio Mining Company to said defendants as directors and officers of said corporation * * * are each, every and all illegal and fraudulent.” (Decree, page 2.)

and further:

“That increases in salaries of defendants as directors and officers of Presidio Mining Company, including the increase in salary of E. M. Gleim since December, 1912, are each, every and all illegal and fraudulent, together with each, any and all acts, proceedings or authorizations relative thereto shown by the records of said Presidio Mining Company as having been adopted by said defendant directors and officers.” (Decree, page 4.)

The decree, in addition to the general order of reference requiring findings heretofore quoted, makes specific orders of reference to the master as follows:

“That said L. Osborn report and account for all salaries received by him since January 1, 1913 from Presidio Mining Company, or any of its officers, on behalf of said corporation.” (Decree, page 5.)

“That defendants W. S. Noyes, B. S. Noyes, John W. F. Peat, and L. M. Doherty report the salaries received by them each respectively from the Presidio Mining Company since January 1, 1913.” (Page 5.)

“That the defendants be required to present evidence before the Master, if any they have, to show that said salaries or increases thereof were and are reasonable and fair; also to take evidence on behalf of complainants wherein said salaries or increases thereof were and are unreasonable or unfair.” (Page 5.)

“That said Master take and report like evidence in regard to the salary of E. M. Gleim, and any increases thereof.” (Page 5.) [96]

“That the Master ascertain and report all salaries and increases in salaries paid directly or indirectly to the defendants other than the Presidio Mining Company, and also E. M. Gleim, since January 1, 1913, as hereinbefore ordered, together with any other sums received by said defendants as and for directors fees, traveling expenses or other purposes since January 1, 1913.” (Page 8.)

I construe these directions as requiring me to find the actual salaries, directors fees, etc., paid the persons named, and as regards all the defendants, except Gleim and Doherty, to find whether the salaries paid were reasonable and the amount of excess in each case. Miss Doherty was paid no salary. If, however, the decree can be construed as requiring me to find as to the reasonableness of the

salary paid to E. M. Gleim, who is not a defendant, then I find that the actual salaries paid to him were reasonable. It is to be particularly noted that the period under consideration is restricted to the period following January 1, 1913; and also that I am not required to find interest due upon excessive amounts, if any.

The finding first noted to the effect that the resolutions as to salaries and the payments of salaries were illegal and fraudulent, might imply either that the directors concerned voted upon or were a part of a quorum at a meeting where resolutions fixing salaries were passed,—a not infrequent cause of illegality; or, it may be that the Court declared the illegality of the resolutions and the payments because of the conspiracy which has been found, to so manage the corporation as to divert its funds for the benefit of the majority stockholders in fraud of the minority stockholders. The law in such matters should be first stated. If a director or officer of a corporation fails in his primary duty of loyalty to his principal and is guilty of fraud, he may, in the discretion of the Court, be denied compensation entirely, and compensation paid may be recovered. The purpose of this drastic rule is to insure honesty. [97] *Mechem on Agency*, Sections 1189, 1190; 1588, 1589. The Courts may, however, and frequently do allow some compensation for such services of officers as may be considered not tainted with fraud.

Directors, as such, are not entitled to compensation for the assumption of their trust, unless there

is a prior valid contract for payment for their services. In this case, I shall deny directors fees which were paid, for the reason that no such contract or valid resolution has been brought to my attention. Directors, however, may, as officers of a corporation, as here, be entitled to a reasonable salary. If, however, it is to be considered that the Court has here pronounced the resolutions as to salaries illegal, irrespective of fraud, then the director, as officer, is not entitled to salary by virtue of a contract but for the reasonable value of his services under a *quantum meruit*. Bassett vs. Fairchild, 132 Cal. 637; Gardner vs. Butler, 30 N. J. Eq. 724.

The position of the complainants here in argument appears to be that all of these defendants should return their salaries paid since January 1, 1913, though they seem to make concession of \$75 a month to Osborn, who was secretary for part of that period. Why Osborn, a confessed embezzler, should be allowed any sum in preference to other defendants, is not clear. It seems to me that the Court, in drafting the decree and directing the scope of the reference had in mind the milder rule that these defendants should be allowed a reasonable sum for their services as officers to the corporation; the fruits of any frauds being recovered to the corporation otherwise. I have accordingly, in the tabulation which follows, noted the actual amounts received by various officers, and have stated what, in my opinion, was a reasonable salary in each case, with a notation of the excessive payments for which

repayment [98] to the Presidio Mining Company is due. The salaries for the period from 1885 to 1913 are given for the purposes of comparison only. The year 1912 is separately stated, as it was the year prior to the one with which this accounting begins. It will be noted that as I have deemed the salary of the secretary at all times excessive, I have stated for the year 1912 what I consider would have been a reasonable salary, so as to make the two years fairly comparable. I do not mean in this tabulation to imply that the salary of the superintendent for 1912, W. S. Noyes, at \$450 per month, was a reasonable one. The tabulation follows:

Officers.	Amt. Mo.	Received Year	Reasonable Salary Mo.	Excess Due P. Mining Co. Mo.
		1885—1907		
Pres. (Boyd)	\$200	\$2400		
Sec. (Osborn)	300	3600		
Supt. (W. S. Noyes)	450	5400		
Total		\$11400		
		1908—1911		
Pres. (Peat)	25	300		
Secy. (Osborn)	300	3600		
Supt. (W. S. Noyes)	450	5400		
Total		\$9300		
		1912		
Pres. (Peat)	25	300		
Secy. (Osborn)	300	3600	100	1200
Supt. (Noyes)	450	5400		
Asst. Supt. (Gleim)	250	3000		
Total		12300		say \$9900

Officers.	Amt. Mo.	Received Year	Reasonable Salary Mo.	Excess Due	
				P. Mining Co. Year	
		1913			
Pres. (Peat)	25	25	25	25	....
" (B. S. Noyes)	150	1650	100	1100	\$550
V. P.—Mgr. (W. S. Noyes)	450	5400	250	3000	2400
Secy. (Osborn)	300	3600	75	900	2700
Asst. Secy. (Peat)	25	275	25	275	
Supt. (Gleim) 7 mos.	350)		350)		
5 mos.	450)	4700	450)	4700	
Total		<u>\$15650</u>		<u>\$10000</u>	

[99]

Officers.	Amt. Mo.	Received Year 1914	Reasonable Salary		Excess Due P. Mining Co.
			Mo.	Year	
Pres. (B. S. Noyes)					
10 mos.	\$150)	\$1750	\$100	\$1200	\$550
2 "	125)				
V. P.—Mgr. (W. S. Noyes)					
10 mos.	450)	5250	250	3000	2250
2 mos.	375)				
Secy. (Osborn)					
10 mos.	300)	3500	75	900	1600
2 "	250)				
Asst. Secy. (Peat)					
10 mos.	25)	290	25)	290	
2 "	20		20)		
Supt. Gleim					
10 mos.	450)	5250	450)		
2 "	375)		375)	5250	
Total		<u>\$16040</u>		<u>5250</u>	<u>\$10640</u>

Officers.	Amt. Mo.	Received Year	Reasonable Salary		Excess Due P. Mining Co.
			Mo.	Year	
		1915			
Pres. (B. S. Noyes)	125	1500	100	1200	300
V. P.—Mgr. (W. S. Noyes)	375	4500	250	3000	1500
Secy. (Osborn) 9 mos.	250	2250	75	675	1575
Secy. (Peat) 3 “	270	810	100	300	510
Asst. Secy. (Peat)					
9 mos.	20	180	20	180	
Supt. (Gleim) 10 “	375)				
1 “	397.50)				
1 “	450)	4597.50		4597.50	
Total		<u>\$13837.50</u>			<u>\$9952.50</u>

Officers.	Amt. Mo.	Received Year	Reasonable Salary		Excess Due P. Mining Co.
			Mo.	Year	
1916					
Pres. (B. S. Noyes).....	125	1500	100	1200	300
V. P.—Mgr. (W. S. Noyes).....	375	4500	250	3000	1500
Secy. (Peat).....	270	3240	100	1200	2040
Supt. (Gleim)	450	5400	450	5400	
		<hr/>		<hr/>	
		\$14640		\$10800	
1917					
Pres. (B. S. Noyes).....	125	1500	100	1200	300
V. P.—Mgr. (W. S. Noyes).....	375	4500	250	3000	1500
Secy. (Peat).....	270	3240	100	1200	2040
Supt. (Gleim)	450	5400	450	5400	
		<hr/>		<hr/>	
		\$14640		\$10800	

Excess Due
P. Mining Co.

25
125
170

Reasonable
Salary
Mo. Year

Received
Year

Amt.
Mo.

January, 1918.

Officers.

Pres. (B. S. Noyes)	125
V. P.—Mgr. (W. S. Noyes)	375
Secy. (Peat)	270
Supt. (Gleim)	450

RECAPITULATION—Amounts Due Company.

	Salaries.	Directors Fees.	Total
B. S. Noyes	\$2025	\$85	\$ 2110
W. S. Noyes	9275	60	9335
L. Osborn	5875	45	5920
J. W. F. Peat	4760	50	4810
L. M. Doherty	—	45	45
			<hr/> \$22,220

Traveling expenses in the sum of \$3363.15 were paid to W. S. Noyes, the reasonableness of which is not disputed.

Some explanation of my conclusions may be in order. First, as to the secretary, Osborn: During all the period from at least 1906 to 1913 Osborn was stealing the money of the company, as will be shown elsewhere. Not only for this reason, but even if he had been entirely loyal, a salary of \$300 a month seems to me entirely disproportionate to the duties and responsibilities of his office, as disclosed by the evidence. It would appear that such a salary arose solely out of the fact that Osborn was a large stockholder. It is not infrequent that in such cases large salaries are paid without regard to the value of services, but in all such cases the transaction is a dishonest one, and a Court will undo it in every case that comes before it. Although he was a known embezzler of the company's funds, he was kept in office by the other defendants as a director and as secretary until November 10, 1915, when he was committed to Agnews State Hospital for the Insane for treatment as an inebriate, being discharged November 10, 1917 (Tr., 296). During this period the defendant Peat was kept in office at a small salary, as assistant secretary. I am convinced that he was an unnecessary officer, but I have allowed his salary and deducted the amount from what would have been reasonably due to Osborn had he performed [101] the duties of his office without assistance. I have endeavored, in the case of Osborn, as well as in the cases of B. S. Noyes and

W. S. Noyes, to fix a reasonable salary irrespective of the rather shocking findings of fraud made by the decree and shown by the evidence here. If, however, there has been an unconscious influence upon my judgment, the defendants have only themselves to blame for the situation.

As to the salaries of B. S. Noyes and W. S. Noyes: B. S. Noyes took office in the early part of 1913 at his brother's request, largely for the purpose of watching Osborn, to see that he did not steal the money of the corporation. (Tr., 29.) He is, however, a man of ability, and undoubtedly performed services to the corporation which are worth the sums which I have set forth. It may be that if W. S. Noyes had not been employed as vice-president and general manager Mr. B. S. Noyes, as president, would reasonably have been worth the salaries of \$150 and \$125 per month actually paid to him. W. S. Noyes has been connected with this mine since 1885. He was superintendent until 1913, and resided in Shafter, Texas, where the mine was situated, until 1901. After that date he lived in Oakland, making occasional visits to the mine, both he and his brother, B. S. Noyes, giving only a part of their time to this company. After the removal of W. S. Noyes to this state it appears from the evidence that for part of the time prior to 1912 H. S. Gleim had some sort of supervisory position in Shafter, and E. M. Gleim was in a subordinate position. In 1912 Noyes was in charge as superintendent, but the assistant superintendent in charge on the ground was E. M. Gleim, at a salary of \$250

a month. After W. S. Noyes secured control of this corporation in 1913, he became vice-president and general manager at the same salary of \$450 a month, and E. M. Gleim became superintendent, first at \$350 a month and later at [102] \$450 a month, and later still at \$375 a month. Gleim's salary is now \$450 a month. I think the salaries actually paid to Superintendent Gleim were reasonable salaries. He is a graduate of Stanford University in mining, and actually designed and superintended the erection of the cyanide installation in 1913, which has been a notable factor in improving the condition of this company. I have had his salary generally in mind in determining the salaries to be paid to W. S. Noyes and B. S. Noyes. I have also had in mind the fact that Mr. Handy, who represents the receiver at Shafter, is being paid \$450 a month, the same salary as the superintendent. There is need of an executive at San Francisco, but I do not believe that there is need of two executives at San Francisco. Furthermore, I have assumed that the discomforts and financial disadvantages to an active business man of a residence in a frontier town in Texas are worth at least \$100 a month. In other words, if Mr. Handy could perform his duties and reside in San Francisco, I should consider that his services were worth \$100 less than they are under the circumstances. Hence, I fix the salaries of the Noyes brothers together at the sum of \$350 a month. The fact that their employment takes only a part of their time, that they have opportunities of en-

gaging in other businesses, and do so engage, represents a value to them of at least \$100 a month.

As to the defendant Peat: This witness seems at all times to have been a dummy. He was obviously so during the period of his presidency at \$25 a month, not only from the salary received, but by the direct testimony of the embezzler, Osborn, who effected his thefts by reason of the fact that Peat signed any checks which Osborn prepared for him (Tr., 137). As assistant secretary, at the same salary, he himself testified that his duties were merely nominal. The place was obviously made for him because he was useful to the other defendants in [103] the control of the corporation. When Osborn was committed to an insane hospital, Peat was made his successor at \$270 a month. There is very good evidence to support complainants' view that it was arranged between him and the Noyes brothers that the greater part of this salary should be applied for the benefit of Osborn's family. For six months after Osborn's commitment Peat paid \$200 a month to William Osborn, son of the defendant Osborn, and in the seventh month \$170. For this he took notes, which are in evidence, payable one day after date, upon which neither principal nor interest have been paid. There is some evidence to the effect that these purported loans were to be secured by Osborn's stock interest. There is no evidence of further payments to Osborn, or to his family, except a loan of \$200 in September, 1917, and another of \$100 during the next month to another son, Charles Osborn, for which Peat took notes secured by stock. Whatever

may be the character of the earlier loans, whether *bona fide* loans or payments under agreement, there is not sufficient reason why the *bona fides* of the last two loans should be suspected. Complainants seek to charge \$200 a month of Peat's salary as secretary to L. Osborn. Since, however, it was not paid to Osborn, and since during all this period he was legally incompetent, I do not see how any sums can be charged against him on account of Peat's salary.

III. W. S. NOYES' TRANSACTION WITH BENTON BOWERS.

The decree orders me to find as follows:

The nature and character of the transaction of W. S. Noyes and Benton Bowers on wood contracts, hauling contracts or otherwise growing out of the contractual relations between Benton Bowers and the said Presidio Mining Company, with amounts received and interest. (Decree, page 7.)

That said W. S. Noyes further account for all sums of money received by him prior to January 1, 1913, other than salary while in the employ of the Presidio Mining Company, and during the period while complainants were stockholders in said corporation, to wit, since on or about September 14, 1908. (Decree, page 7.) [104]

That the Master ascertain and report what amount of money, if any, from any sources connected with Presidio Mining Company business, other than salary, the said W. S. Noyes received since January 1, 1913, while in the

employ of the Presidio Mining Company, with interest at the rate of 7 per cent per month, from dates of receipt thereof by said William S. Noyes. (Decree, page 7.)

The evidence shows that until a comparatively late period defendant W. S. Noyes was a concealed partner of Benton Bowers in his teaming business. The relationship arose in 1894. At the time the character of wood obtainable by the company for fuel purposes being unsatisfactory, Noyes, the superintendent of the mine, took up with Bowers the proposition of obtaining wood from Mexico, just over the river frontier. Bowers *need* money to handle the transaction, and Noyes undertook to furnish him one-half of the necessary money for a half interest in the profits of the business. (Tr. 633, seq.) Noyes says (Tr. 204), that he put in about \$4000 into the business with Bowers. Bowers remembers only \$800 that was advanced by Noyes (Tr. 643). It was anticipated, they say, that the wood should be supplied to the company at cost, and that this was done during all the time when wood was delivered. The profit in the business was made in selling supplies to teamsters, to workmen, and to ranchers along the road (Tr. 639). The company commenced to use oil for fuel in 1902 (Tr. 637), and thereafter only such wood was hauled as was necessary for retorting purposes. At a period which does not definitely appear, Mr. Bowers undertook the general freighting of the company's supplies in and out of Shafter to the railroad point, and is still doing so. Mr.

Handy, the receiver's representative, testifies that his price is slightly higher than what other teamsters would charge, but that it is worth it for the reliability and efficiency of his service. I have no reason to doubt this has always been the case. Bowers claims that he has made [105] no money out of either his wood hauling or freight hauling contracts with the company, his profits coming from outside transactions. This, however, seems rather a matter of impression on his part rather than of exact calculation (Tr. 650). I believe that the prices charged by him to the company were reasonable prices. Noyes was never known to anyone to be interested in the business (Tr. 646-7, 650). Bowers says (Tr. 646) that between 1896 and 1908 there was an average profit in the business of \$100 a month for each of the partners, namely Bowers and Noyes. After 1908 expenses increased and the profits diminished, as are shown in tabulation hereafter set forth. During all this time Noyes had the absolute responsibility and discretion as regards the company's business in relation to making contracts of haulage and freights.

The law on this subject is clear, that one in a fiduciary relationship, like the superintendent of this mining corporation, is not permitted to profit directly or indirectly from any business connected with his trust beyond the amount of his stated salary, unless his adverse interest is clearly known and agreed to by his principal. The fairness or unfairness of the transaction will not be inquired into, and it is immaterial whether the corporation was in-

jured or not by the contract in which the agent was interested. The reason for this is, first, that if fraud exists it is often difficult of proof, especially as in such cases as this after a lapse of many years; second, that the discretion of a trusted agent cannot be permitted in any way to be fettered by an adverse self-interest. It might, for example, have been better during some part of this period for another contractor to have been given the work instead of Bowers. Mr. Handy says, for example, that while he considered it wise at the present time to maintain relations with Mr. Bowers, it might, in normal times, be better for the company to conduct [106] its own transportation of freight. (Tr. 570.) Obviously, in the decisions of such questions as this, whether that decision be for or against a continued contract with Bowers, Noyes' discretion would be unfavorably influenced by his own participation in the profits of Mr. Bowers' business. The law on this subject is settled in many cases, of which I cite the following, which will repay a careful reading: *U. S. v. Carter*, 217 U. S. 286, 305, seq.; *Wickersham v. Crittenden*, 93 Cal. 29; *Western States Life Insurance Co v. Lockwood*, 166 Cal. 191; *Moore v. Building Association*, 45 S. W. 974 (Texas).

I find, accordingly, that defendant William S. Noyes received from Benton Bowers on account of their partnership business since September 4, 1908, the following sums, which should now be returned to the Presidio Mining Company, with interest at 7 per cent per annum to date of this report, as follows:

	Interest to Nov. 30, 1918.			Total	
Dec. 31, 1908	\$500	9 yrs. 11 mos.		\$347	\$847
" 1909	500	8 yrs. 11 "		312	812
" 1910	500	7 " 11 "		277	777
" 1911	500	6 " 11 "		242	742
" 1912	500	5 " 11 "		207	707
" 1913	500	4 " 11 "		172	672
July, 1914	195	4 " 4 "		59.15	254.15
Totals	<u>\$3195</u>			<u>\$1616.15</u>	<u>4811.15</u>

IV. MINE BOARDING-HOUSE.

The decree in this regard directs as follows:

“That the Master ascertain and report to this Court the nature and character of the transactions had by the said W. S. Noyes prior to January 1, 1913, but subsequent to the time that the complainants became stockholders in the Presidio Mining Company (September 14, 1908), in regard to the mine boarding-house, with amounts received and interest at 7 per cent per annum. (Page 7.)

“That said William S. Noyes further account for all sums of money received by him prior to January 1, 1913 other than salary while in the employ of the Presidio Mining Company, and during the period while complainants were stockholders of said corporation, to wit, since on or about September 14, 1908, with interest at 7 per cent per annum.”

The facts as regards this unpleasantly petty transaction are given by William S. Noyes, himself, as follows: (Tr. page 220 seq.) Between 1893 and 1895 Noyes, then superintendent, made an arrangement with James Mann, a foreman at the mine, to conduct a boarding-house for white employees in one of the company's buildings. Noyes and Mann each put up \$200 or \$300 for dishes and other such equipment. The partners made \$30 or \$40 apiece a month for a while, though in the period under consideration, after September, 1908, Noyes states that the profits were about \$10 a month apiece. Mann left the employ of the company and the operation of

the boarding-house in September, 1910. Noyes says that shortly before that he withdrew from the partnership. The transaction was not known to any stockholder or director of the company (Tr. 224). The law which covers such a transaction as this is the same as that already stated in the discussion of the matter of Benton Bowers. I find that there is due from William S. Noyes to the Presidio Mining Company the following sums, with interest calculated to date of this report, as follows: [108]

	Interest to Nov. 30, 1918.		Total
Sept. 1908	\$10	\$7.10	\$17.10
Oct. “	10	7.05	17.05
Nov. “	10	7.00	17.00
Dec. “	10	6.95	16.95
Jan. 1909	10	6.90	16.90
Feb. “	10	6.85	16.85
Mar. “	10	6.80	16.80
Apr. “	10	6.70	16.70
May “	10	6.65	16.65
June “	10	6.60	16.60
July “	10	6.55	16.55
Aug. “	10	6.50	16.50
Sept. “	10	6.45	16.45
Oct. “	10	6.35	16.35
Nov. “	10	6.30	16.30
Dec. “	10	6.25	16.25
Jan. 1910	10	6.20	16.20
Feb. “	10	6.15	16.15
Mar. “	10	6.10	16.10
Apr. “	10	6.05	16.05
May “	10	6.00	16.00

June	“	10	5.95	15.95
July	“	10	5.90	15.90
Aug.	“	10	5.85	15.85
Sept.	“	10	5.75	15.70

Totals		<hr/> \$250	<hr/> \$160.95	<hr/> \$410.95
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[109]

V. TRANSACTION OF W. S. NOYES WITH E. G. GLEIM COMPANY.

The decree orders me to report as follows:

“The nature and character of the transaction of the said W. S. Noyes with the E. G. Gleim store, with amounts received and interest at 7 per cent. (Page 7.)

“That said William S. Noyes further account for all sums of money received by him prior to January 1, 1913 other than salary, while in the employ if the Presidio Mining Company, and during the period while complainants were stockholders of said corporation, to wit, since on or about September 14, 1908, with interest at 7 per cent per annum. (Pages 6-7.)

“That the Master ascertain and report what amounts of money, if any, from any sources connected with Presidio Mining Company business other than salaries the said William S. Noyes received since January 1, 1913, while in the employ of the Presidio Mining Company, including Gregg & Gleim tramway contract.”
(Page 7.)

The store belonging to E. G. Gleim, doing business as the E. G. Gleim Company, has been at Shaf-

ter since the beginning of the mine, about 1885, when Noyes got Gleim to establish it there. It was intended originally that the store should be on the Presidio Mining Company's property, but as it subsequently transpired upon a survey and as it exists at the present time a corner of the building is on the company's property and the rest on ground belonging to Gleim. There are two other similar stores at Shafter. The Gleim store now and always has done the great bulk of the business with the Presidio Mining Company and with most of its employees. There was a time when water and light were furnished by the mine to the store at a charge (Deposition of Gleim, page 7), but since 1908 no charge has been made. At the present time on most articles which the company purchases from the store Gleim makes a price of cost to him at Shafter plus an overhead of 10 per cent. He makes that charge to the company, he says (Deposition, page 30), for the privilege of doing business. The account of the mine with the store is a very large account. I have said that the Gleim store has most of the business of the employees of the mining company. These employees are [110] Mexicans, who usually require goods or advances of cash prior to their payment by the mining company. There are several hundred employees of this sort, and doubtless their business is a valuable one. To facilitate it, an arrangement was necessary with the mining company which would protect the store. Prior to about February, 1914 (Exhibit 12), apparently the accounts were reported to the company and deducted from

the pay-roll. After that date a written order on the company was required. Later on, the method was for each employee to execute a power of attorney to Gleim's bookkeeper which would authorize him to sign orders upon the company against amounts due the miner. Out of this arrangement for a long time, the earliest date not being disclosed, but prior to 1908, Noyes, individually, drew a profit from E. G. Gleim, which likewise was not disclosed to the company or to its directors or stockholders. Noyes says (Tr. 192) that in the 90's Gleim paid him 4 or 5 per cent on the amount of these accounts, and this later became \$100 a month. Noyes' explanation of the reason for this payment to him is as follows (Tr. 167): "The miners and some of the mill men bought goods at the store and Mr. Gleim got me to collect his bills for him and to advise him what credits were good and what credits it would not be wise for him to grant, and to keep him posted on the safety of his bills." (See also Tr. page 175.) At another point in the evidence he speaks of it as a commission. Whatever may have been the fact in the earlier period, it is obvious that this explanation has no weight after 1901, when Noyes moved to California. After that date it is unlikely that he would have been able to have advised Mr. Gleim with respect to the credit of any particular Mexican laborer, and it is obvious that he did not do the work of collection. That work was done by the bookkeeper employed and paid by the Presidio [111] Mining Company. Mr. Gleim's explanation of the payment is that it was a gift to Mr. Noyes out of old

friendship (Deposition page 7). Being asked what Noyes did in return for this payment, he said (Deposition page 15): "The amounts simply went into the office and were collected."

So far as the transactions with the miners are concerned, it is obvious that the company was not harmed by the arrangement between Noyes and Gleim, and that the only one who was out money was E. G. Gleim. We may assume, however, that the prices he charged to the Mexicans would provide for the payment to Noyes, but this, again, does not particularly concern the company's interest. However, one may not be sure that the 10 per cent overhead would not include the \$100 paid to Mr. Noyes, who was, in effect, a salaried employee of the store. But apart from these considerations, the cases already cited are here applicable. It was not open to Noyes to fetter his discretion as superintendent as to where he should buy his supplies by going on the pay-roll of any particular merchant. The reason why Gleim paid him this money is perfectly apparent: In the first place, he probably was grateful to Noyes for a business which has been prosperous; secondly, the continued prosperity of his business was largely due to Noyes' favor, for the latter, being in absolute control of the mining company at Shafter, could have required Gleim to move his store from the company's property, could have taken the company's business away, and, most important of all, could have refused to have facilitated credits to the Mexican employees with direct payments from the mine to the store when each pay-roll was paid.

The last payment shown by the evidence to have been made to Noyes by Gleim was in October, 1913. I find, therefore, that there is due from William S. Noyes to the [112] Presidio Mining Company from September, 1908, to date, the following sums with interest to date of this report, at the rate of 7 per cent per annum:

	Interest to Nov. 30, 1918.		Total
Sept. 1908	\$100	\$71.16	171.16
Oct. “	100	70.58	170.58
Nov. “	100	70.00	170.00
Dec. “	100	69.38	169.38
Jan. 1909	100	68.80	168.80
Feb. “	100	68.22	168.22
Mar. “	100	67.64	167.64
Apr. “	100	67.06	167.06
May “	100	66.48	166.48
June “	100	65.90	165.90
July “	100	65.32	165.32
Aug. “	100	64.74	164.74
Sept. “	100	64.16	164.16
Oct. “	100	63.58	163.58
Nov. “	100	63.00	163.00
Dec. “	100	62.38	162.38
Jan. 1910	100	61.80	161.80
Feb. “	100	61.22	161.22
Mar. “	100	60.64	160.64
Apr. “	100	60.06	160.06
May “	100	59.48	159.48
June “	100	58.90	158.90
July “	100	58.32	158.32
Aug. “	100	57.74	157.74

142 *Presidio Mining Company et al. vs.*

Sept.	“	100	57.16	157.16
Oct.	“	100	56.58	156.58
Nov.	“	100	56.00	156.00
Dec.	“	100	55.38	155.38

	Forward	\$2800	\$1771.68	\$4571.68
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[113]

Interest to Nov. 30, 1918. Total

	Forward	2800	1771.68	4571.68
Jan.	1911	100	54.80	154.80
Feb.	“	100	54.22	154.22
Mar.	“	100	53.64	153.64
Apr.	“	100	53.06	153.06
May	“	100	52.48	152.48
June	“	100	51.90	151.90
July	“	100	51.32	151.52
Aug.	“	100	50.74	150.74
Sept.	“	100	50.16	150.16
Oct.	“	100	49.58	149.58
Nov.	“	100	49.00	149.00
Dec.	“	100	48.38	148.38
Jan.	1912	100	47.80	147.80
Feb.	“	100	47.22	147.22
Mar.	“	100	46.64	146.64
Apr.	“	100	46.06	146.06
May	“	100	45.48	145.48
June	“	100	44.90	144.90
July	“	100	44.32	144.32
Aug.	“	100	43.74	143.74
Sept.	“	100	43.16	143.16
Oct.	“	100	42.58	142.58
Nov.	“	100	42.00	142.00

Dec.	"	100	41.38	141.38
Jan.	1913	100	40.80	140.80
Feb.	"	100	40.22	142.22
Mar.	"	100	39.64	139.64
Apr.	"	100	39.06	139.06
May	"	100	38.48	138.48
June	"	100	37.90	137.90

Forward	\$5800	\$3162.34	\$8962.34
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[114]

		Interest to Nov. 30, 1918.	Total
Forward	\$5800	\$3162.34	\$8962.34
July 1913	100	37.32	137.32
Aug. "	100	36.74	136.74
Sept. "	100	36.16	136.16
Oct. "	100	36.58	135.58
	\$6200	\$3308.14	

Total due P. M. Co. Nov. 30, 1918. . . . \$9508.14

VI. TRANSACTION OF W. S. NOYES WITH GREGG & GLEIM REGARDING TRAM-WAY.

The decree orders a reference as follows:

"The nature and character of the transactions of said William S. Noyes with Gregg & Gleim on any ore hauling or other contracts between Gregg & Gleim and the Presidio Mining Company, with amounts received by Noyes and interest at 7 per cent. (Page 7.)

"That the Master ascertain and report what amount of money, if any, from any sources connected with the Presidio Mining Company busi-

ness other than salary, the said William S. Noyes received since January 1, 1913, while in the employ of the Presidio Mining Company, including the Gregg & Gleim tramway contract.’’

The facts in this regard will be briefly stated: Prior to 1913 or until a tramway was constructed, Gregg & Gleim had a contract to haul ore from the mine to the mill of defendant company at 85 cents a ton. There is nothing in the evidence to show that this was an unreasonable contract, nor is there anything to show that Gregg & Gleim paid any money to William S. Noyes on account of it. One of the improvements which was made at the time the cyanide process was installed was the building of a tramway from the mine to the mill, to take the place of the teams which had formerly hauled the ore. The company entered into a contract, which is in evidence, whereby Gregg & Gleim agreed to build the tramway and spend therefor up to \$16,000, the company to provide the remainder of the cost. Gregg & Gleim also had the right to operate that tramway for one year after its installation at 40 cents per ton of ore. The tramway was built, Gregg & [115] Gleim paying \$16,000 and the Presidio Mining Company, in round numbers, \$8,000 toward its construction. Shortly thereafter it was determined that the company had best exercise an option provided in the contract for purchase of the tramway on payment of the \$16,000 spent by Gregg & Gleim, and this was done, the company giving four notes of \$4000 each with interest at 10 per cent per annum. The com-

pany also concluded that it was advisable that they should take over from Gregg & Gleim their right to operate the tramway, and the contract provided that it was estimated that had Gregg & Gleim operated the tramway they would have carried 36,000 tons of ore at a profit of 25 cents per ton, or \$9,000, and the company accordingly agreed to pay them as commuted profits the sum of \$9,000 in installments at \$750 per month. This was done. Whether or not this arrangement was a wise one or not is not here in question. The explanation of the transaction by Mr. B. S. Noyes (Tr., page 450) seems to me a reasonable one, and I see nothing corrupt in it. There is nothing to show that W. S. Noyes ever received any money from Gregg & Gleim arising out of this matter. I find, accordingly, that there is nothing due from W. S. Noyes to the Company on this account.

VII. OTHER TRANSACTIONS.

The decree also provides that the Master examine and report upon the following:

“The nature and character of the transactions of said William S. Noyes with any other persons having business relations with the Presidio Mining Company, with amounts received by him, and interest.” (Page 7.)

Various other transactions are referred to in the evidence, but there are none of a suspicious nature, and none in which it is shown that any money was paid to William S. Noyes. [116]

VIII. AMOUNTS EMBEZZLED BY L. OS-
BORN.

The decree provides as follows:

“That L. Osborn account for all sums of money found by the Master as misappropriated by said L. Osborn from the Presidio Mining Company’s treasury, together with interest at the rate of 7 per cent per annum from date of misappropriation.” (Page 8.)

Following are the dates and amounts of the embezzlements in question with interest to date of this report, as required. It will be noticed that, following the findings of the decree, I have given no credit for the payment to the company by Osborn of \$5000 on February 25, 1913, and \$5689.75 on March 1, 1913; nor for the credit voucher for \$3500 given Osborn by Noyes on September 6, 1913. This left as the only credit certain payments by Osborn to the company in February, 1917 of \$1007; I have dropped the odd sum from both sides of the account to facilitate the calculation of interest:

			Interest to Nov. 30, 1918.		
			12 yrs.	4 mos.	
July 1906	\$ 150		12	"	\$129.50
Sept. "	150		12	"	127.75
March 1907	150		11	"	122.50
June 1907	100		11	"	79.90
Aug. "	100		11	"	78.74
Dec. "	100		10	"	76.38
Jan. 1908	100		10	"	75.80
Feb. "	100		10	"	75.22
Mar. "	100		10	"	74.64
Apr. "	100		10	"	74.06
May "	100		10	"	73.50
June "	100		10	"	72.92
July "	100		10	"	72.34

		Interest to Nov. 30, 1918.	
Aug. 1908	100	10 " 3 "	\$71.76
Oct. "	100	10 " 1 "	70.58
Forward			<hr/>
			\$1275.59
Forward.....	\$1650		\$1275.59
Dec. 1908	200	9 yrs. 11 mos.	138.76
Jan. 1909	100	9 " 10 "	68.80
Feb. "	200	9 " 9 "	136.44
Mar. "	250	9 " 8 "	169.10
Apr. "	100	9 " 7 "	67.06
May "	100	9 " 6 "	66.50
June "	200	9 " 5 "	131.85

		Interest to Nov. 30, 1918.			
July	1909	100	9	" 4 "	\$65.32
Aug.	"	100	9	" 3 "	64.74
Sept. & Oct. '09		400	9	" 1 "	254.32
Nov.	1909	125	9	"	78.75
Dec.	"	300	8	" 11 "	187.25
Jan.	1910	100	8	" 10 "	61.80
Feb.	"	300	8	" 9 "	183.75
Apr.	"	300	8	" 7 "	182.00
May	"	200	8	" 6 "	119.02
June	"	300	8	" 5 "	176.75
July	"	100	8	" 4 "	58.32
Aug.	"	200	8	" 3 "	115.51
Sept.	"	200	8	" 2 "	114.34

		Interest to Nov. 30, 1918.			
Oct. 1910	200	8	" 1 "	113.17	
Nov. "	300	8	" "	168.00	
Dec. "	300	7	" 11 "	166.25	
Jan. 1911	300	7	" 10 "	164.50	
Feb. "	400	7	" 9 "	216.97	
Mar. "	400	7	" 8 "	214.64	
Apr. "	200	7	" 7 "	106.19	
May "	300	7	" 6 "	157.50	
June "	300	7	" 5 "	155.75	
July "	300	7	" 4 "	154.00	
Aug. "	300	7	" 4 "	152.25	
Forward	\$8825				\$5485.09

Forward		Interest to Nov. 30, 1918.						
		\$8825	7 yrs.	2 mos.			\$5485.19	
Sept. 1911		300	7	"	1	"	150.50	
Oct. "		300	7	"	"	"	148.75	
Nov. "		400	7	"	"	"	196.00	
Dec. "		325	6	"	11	"	158.18	
Jan. 1912		550	6	"	10	"	263.00	
Feb. 1912		300	6	"	9	"	141.75	
Mar. "		300	6	"	8	"	140.00	
Apr. "		300	6	"	7	"	138.25	
May "		300	6	"	6	"	136.50	
June "		350	6	"	5	"	157.20	
July "		400	6	"	4	"	177.32	
Aug. "		650	6	"	3	"	284.37	
Sept. "		400	6	"	2	"	172.66	

		Interest to Nov. 30, 1918.	
Nov. 1912	300	6 "	126.00
Dec. "	200	5 " 11 "	82.76
Jan. 1913	100	5 " 10 "	40.80
Apr. "	900	5 " 7 "	351.75
			<hr/>
		\$15,200	\$8,350.98

CREDITS.

Feb. 3, 1917	\$1000	1 yr. 10 mos.	\$128.30
			<hr/>
Balance	\$14,200		\$8,222.68

SUMMARY.

Total amount due Presidio Mining Co. from L. Osborn,	
of moneys embezzled, Nov. 30, 1918 Principal	\$14,200.
Interest	8,222.68
	<hr/>
	\$22,422.68
	<hr/>

IX. RECAPITULATION.

Recapitulating, for convenience, the foregoing findings, we have the following sums owed to the Presidio Mining Company on November 30, 1918, by the persons named:

1. William S. Noyes:

Section 5	\$28,177.70	
Salary and fees	9,335.00	
Bowers	4,811.15	
Boarding-house	410.95	
E. G. Gleim Co.	9,508.14	\$52,242.94

2. L. Osborn:

Embezzlements	\$22,422.68	
Salary and fees	5,920.00	\$28,342.68

3. B. S. Noyes, Salary and fees	2,110.00
4. J. W. F. Peat do	4,810.00
5. L. M. Doherty, Director's fees	45.00

Grand Total	\$87,550.62
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X. COMPLAINANT'S DISBURSEMENTS.

The decree on this question reads as follows:

“That during said accounting before said Master in Chancery evidence be submitted by complainants as to all costs and expenses of every kind and nature actually incurred by *them investigating* the affairs of the Presidio Mining Company in all its ramifications, and of the services rendered personally by complainants and their counsel in connection therewith. (Decree pages 8, 9).

“That the allowance of costs herein including the moneys expended by complainants in investigating the affairs of said Presidio Mining Company, allowance for personal services and counsel fees, and the costs of reference be deferred until the making of the final decree herein.” (Pages 8, 9.)

There is some question as to how much is by this language committed to the Master. The language quoted follows the general direction of the Court to the Master to ascertain the [120] evidence with his opinion and findings. In the first place it seems to be agreed by the parties that while the Master should find the amount which has been expended for counsel fees, he should not advise the Court, either by findings or opinion, as to the amount which the Court should allow. No evidence was given on this question and no argument offered by either party. I shall, therefore, make no finding,—indeed no allowance can be made except for services to date even by the Court. I shall, however, point out that certain services of counsel in my opinion are not allowable in this particular litigation. Referring to the matter of “costs of reference,” those costs, so far as they pertain to reporters’ expense and the like, are here given, but there will be in addition the Master’s fee, not yet determinable, and possibly further clerk’s fees, witness fees, and the like not here set forth.

It has, however, seemed to me necessary and fairly contemplated by the language of the decree that in stating the costs and disbursements shown by

the evidence I should group them under various heads according to their character, There will be, for example, a group of Taxable Costs. These are the costs which are payable in litigation of this sort equally with all lawsuits to the successful party by the unsuccessful party. They are sometimes called "costs as between party and party," and would here be payable to the plaintiff Overton by the defendants other than the Presidio Mining Company. Such costs, under the rules of this court, are determined by the clerk of the court under a procedure laid down by the rules. In determining them here in advance of the clerk's action which has not yet taken place I have no intention of usurping the clerk's jurisdiction. It is necessary for me, however, to make such a determination of what are taxable costs, in my opinion, in order to know what are the costs allowable under the next group, that is, the [121] costs payable by the Presidio Mining Company to plaintiff Overton out of the funds which has been made available to that company by this litigation. If, however, the clerk, or the Court on appeal from the clerk's decision, shall differ from my determination on the question of taxable costs, the items of difference will all fall within the second group payable by the defendant company with the exception of a few items of taxable costs in the ancillary receivership proceedings in Texas. I have included them as taxable costs in this case, because it seemed to me obviously convenient and desirable that they should be settled here rather

than be taxed in the *pro forma* proceedings in Texas; but if I am mistaken in this determination those expenses will not go into the second class, but will be entirely eliminated from the determination of this Court and be passed upon by the Court of ancillary jurisdiction.

The second group of allowable disbursements are those which are nontaxable against the individual defendants, but which, in accordance with the principles of courts of equity administering a fund, will be paid to plaintiff by the Presidio Mining Company out of the fund which is here recovered for its benefit from the defendants. They are of the same character as payments which will be made to counsel and the payment to the Master for his services.

The two remaining classifications of the disbursements made by Captain Overton are those disbursements which, in my opinion, are not allowable and the disbursements made for counsel services. As to the former class, it will be noted that the Master differs quite radically from complainant's counsel as to the principles upon which allowances of disbursements are made by a court of equity. Complainant Overton has spent a great deal of money and much of his time in [122] a highly meritorious and successful service in behalf of this corporation. The theory of complainant's counsel seems to have been that he would be reimbursed for his services and for his disbursements in everything which in good faith he undertook in and about the litigation against these defendants.

The language of the decree above quoted gives some justification for this point of view. It is not, however, a necessary interpretation of the decree, and in view of the fact that the law is clearly otherwise I shall not so construe it. The law on this subject is sufficiently and very clearly expressed by the Supreme Court of the United States in *Trustees vs. Greenough*, 105 U. S. 527. That was a bill by a bondholder and, therefore, a creditor's bill, while this is a stockholder's bill. I cannot, however, see any distinction arising out of this fact which would extend to the application of the principles of that decision to this case. The lower court there allowed the complainant a sum of money for ten years' personal services, and another sum of money for his railroad fares and hotel bills in and about the business of the litigation. I shall not quote or discuss the opinion, which should be read. It is sufficient to say that the Supreme Court denied the two allowances mentioned, and hence it follows that I have not been able to see my way clear to allow the complainant Overton his railroad fare or the sum claimed for his personal services equated at his living expenses reasonably estimated. I have with some doubt allowed him, under the head of "nontaxable costs payable by the company" a sum of money for the services of Mrs. Overton in the examination of the books and records of the Presidio Mining Company and in assisting counsel in all the numerous duties that attended this litigation. It may, of course, be said that she should be placed in the same category as her husband, who

was doing like work, and perhaps this is so. But, on the other hand, if an accountant [123] had been employed for the like service his bill for services would have been allowed, and I have assumed that it was proper that this necessary assistance should be recognized and allowed for. I have been the more ready to do this because although it has been a very difficult and burdensome litigation, only one attorney, Mr. Rose, has been employed in handling the main case. On the principle of the Greenough case I have likewise disallowed costs, disbursements and counsel fees attending a number of other suits besides this one. It is true that if ancillary or auxiliary suits were really necessary to bring the recovered fund into the treasury of the corporation the allowances should cover the expenses of such proceedings. But in my view the other litigation which was here shown had no necessary relation to the present litigation. There is, for example, a slander suit referred to by W. S. Noyes against Captain Overton. It seems that while the latter was in Texas investigating the affairs of this company he is alleged to have used slanderous words with respect to the plaintiff and was accordingly sued *in tort* in the courts of that state. That suit is, of course, incidental to this entire litigation, but it does not benefit the Presidio Mining Company. If, during the trial, Captain Overton, in anger, had committed battery upon Mr. Noyes, or *vice versa*, it could hardly be urged that the expense of such civil litigation should be paid by the stockholders of the company. It is one of the misfortunes that may

occur to anyone who becomes exposed to a lawsuit, and in the contemplation of the law, though not of course as a fact, reimbursement is made in the cost allowed in such proceedings. So, also, there were suits to require the directors of this company to post certain notices, and a suit to compel the transfer of stock to Captain Overton so as to assist him in securing election as a director. It seems to me that the result of this action would have been the same if those suits [124] had not been brought. Likewise, criminal proceedings were initiated against W. S. Noyes for embezzlement, and special counsel employed. The only justification claimed for asking reimbursement of this expense is that the information secured in the trial of that criminal case has been of service in this case. That might be true, and yet the same information might have been obtained in the ordinary way by deposition before trial or upon the trial of the case with which we are concerned. While the services of complainant and his counsel have been meritorious and their conduct of the litigation energetic, there is room for suspicion that times it has been rather hot-headed and overzealous, and that expenses have been incurred that were unnecessary and improperly to be charged against the company in this case.

Following are the disbursements, grouped in the four groups which I have referred to:

(A) TAXABLE COSTS.

These costs are payable to plaintiff W. S. Overton by the defendants other than the Presidio Min-

ing Company. This determination subject to change on clerk's ruling hereafter.

1. Items from Exhibit 13:

Paid to clerk	\$ 124.20
Paid to marshal	104.50
Verification	4.75
W. H. Willis, Reporter	30.00
W. H. Willis, Reporter, (Tr. 404)	288.75
Gagan & Lehner, Reporters	10.00
Gagan & Lehner, Reporters, (Tr. 404)	49.60
Gardiner, witness fees	3.00
Herger, witness fees	3.00
Davis, witness fees	3.00
Clause, witness fees	9.00
Clause, mileage, 200 mi. ...	20.00
Kniffin, 8 days witness	24.00
Kniffin, mileage, 200 mi.....	20.00
Lasky, witness fees and mile- age	41.00
Bond Premiums	110.00
Klink, Bean & Co.	1172.50
Printing brief	174.50
Recording fees	7.00
Copy deed.	10.00

Total (forward) \$2208.80

	Bro't forward	\$2208.80
2.	Items from Exhibit 14:	
	Premium, bond	\$ 25.00
	Verification affidavits .....	.95
	Recording decree	15.00
	Clerk	17.30
	Certified copies	26.75
	Premium, bond	25.00
	Serving orders	3.50
	Marshal	12.00
	Total	125.50
3.	Items from Exhibit 39:	
	Master's bill for reporter and transcription of original of evidence	\$ 222.00
	Expense of depositions (Tr. 682)	40.55
	Counsel's expense on deposi- tion (Tr. 684)	160.11
	Total	422.66
4.	Items subsequent to trial from Master's records:	
	Master's bill for reporter's attendance and transcrip- tion of original	115.90
	Gagan & Lehner, for report- ing argument	35.00
	Total	150.90
	Grand Total	\$2907.86

(B) NONTAXABLE COSTS AND DISBURSEMENTS, ALLOWABLE.

These disbursements are payable to plaintiff Overton by the Presidio Mining Company. They are the expenses other than the ordinary taxable costs, that the Presidio Mining Company might properly have incurred, had it performed its duty and brought this suit against the other defendants. since they are not taxable, they are not payable by those defendants; but they are payable by the company as a reimbursement to plaintiff Overton as a matter of equity. They include disbursements [126] reasonably related to the recovery of the funds here the subject of accounting.

1. Items from Exhibit 13:

Clause, balance expenses	
from El Paso, not taxable	\$133.00
Kniffen, balance not taxable	95.45

Total	\$ 228.45
2. Exhibit 22, Mead, Counsel's Ex- pense	\$ 23.00
3. Exhibit 24, 80% telegrams and tele- phones	137.25
4. Exhibit 25, 80% stationery, etc., 118.46	94.76
5. Exhibit 25, Miscellaneous	91.62
6. Exhibit 28, Mrs. Overton—Investiga- tion of books and assistance to coun- sel	1464.00
7. Exhibit 39, Mrs. Overton, same	236.00

164 *Presidio Mining Company et al. vs.*

8.	Exhibit 39, Master in Chancery, copy of transcript	128.10
9.	Exhibit 39, Klink, Bean & Co., ac- countants	100.00
10.	Master in Chancery, copy of tran- script paid after hearing closed	87.90
11.	Gagan & Lehner—Copy of argument	21.00
		<hr/>
	Total	\$2612.08

(C) DISBURSEMENTS BY COMPLAINANT
NOT ALLOWED.

These are the disbursements made by plaintiff that have no reasonable relation to the recovery of the fund:

1.	Exhibit 14, printing decree and opinion	\$ 60.50
2.	Exhibit 15, all	245.45
3.	Exhibit 16, all	22.45
4.	Exhibit 17, all	11.50
5.	Exhibit 18, all	277.85
		<hr/>
	Forward	\$ 617.75

[127]

	Bro't Forward	\$ 617.75
6.	Exhibit 19, all	60.00
7.	Exhibit 20, all	69.50
8.	Exhibit 21, 20% counsel fees	656.68
9.	Exhibit 21, Expenses Rose	146.82
10.	Exhibit 22, Fees McNutt	600.00
11.	Exhibit 22, Fees Mead	100.00
12.	Exhibit 22, Expenses Mead	62.50

13.	Exhibit 23, 20% stenographer's expense	233.50
14.	Exhibit 24, 20% telegrams, etc.	34.32
15.	Exhibit 25, detective services	27.20
16.	Exhibit 25, 20% stationery, etc.	24.70
17.	Exhibit 26, Overton's railroad fares, on authority Trustees vs. Greenough, 105 U. S. 530, 558	985.51
18.	Exhibit 27, Compensation Overton's services, same authority	4450.00
19.	Exhibit 28, Mrs. Overton, railroad fares	628.61
20.	Exhibit 39, Compensation Overton's services	295.00
Total		<hr/> \$8992.09

(D) DISBURSEMENTS BY COMPLAINANT TO COUNSEL AND TO STENOGRAPHERS.

I am required to find the amount of such disbursements, the Court reserving to itself the determination of the total reasonable counsel fees. It is not usual for the client to pay the charges of his attorney's stenographer; and therefore the Court's judgment has generally been exercised, and naturally would here be exercised, upon the facts showing the worth of counsel's services, including all his office facilities. When counsel fees are allowed, the following sums out of the gross amount allowed will be specifically repayable by the company to plaintiff Overton: [128]

1. W. F. Rose, July, 1915 to June, 1918, \$3283.38, 80% upon the present liti- gation, Exhibit 21	\$2626.70
2. R. P. Henshall, advisory counsel, Ex- hibit 22	500.00
3. C. E. Mead, counsel in Texas, Exh. 22	200.00
4. Stenographers, Exh. 23, \$1167.50, of which 80% was on this suit	934.00
5. Exhibit 39, W. F. Rose, counsel fees	120.00
6. Exhibit 39, W. F. Rose, stenogra- pher's expense	144.00
<hr/>	
Total	\$4525.59

The parties may have until November 20, 1918, to file with the Master objections in writing to the foregoing draft report, which objections should be served in the usual way upon opposing counsel. Thereafter, the Master will consider the objections and settle, sign and file his final report, of which the parties will be notified.

Dated November 7, 1918.

H. W. WRIGHT,
Master in Chancery. [129]

Supplemental Report.

In accordance with the rules and practice of this court the foregoing draft report was announced on November 7, 1918, and counsel for the parties, namely, William F. Rose, Esq., for plaintiffs, and Messrs. Harding & Monroe and J. J. Dunne, Esq., for defendants, were notified thereof and called upon to file objections to the report in writing with the Master within a time named. Thereafter,

within the period of time so granted, the attorneys for the defendants filed objections in writing to the Master's Report on November 25, 1918. Attorney for the plaintiff has filed no objections. Defendants objections are herewith separately returned.

The said objections have been duly considered and are now overruled, and the said draft report is now settled, signed and filed as my final report herein and the parties notified by mail thereof on this 30th day of November, 1918.

H. M. WRIGHT,
Master in Chancery.

[Endorsed]: Filed Nov. 30, 1918. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[130]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN, on Be-
half of Themselves and Other Minority
Stockholders of the PRESIDIO MINING
COMPANY Named in this Complaint,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Stipulation Agreeing upon Receiver.

WHEREAS, in the above-entitled matter, against the objections and exceptions of the above-named defendants, said Court is about to give and make its order that a receiver be appointed herein; and

WHEREAS, it is the intention of said defendants in due and orderly course thereafter to perfect their appeal from said order appointing such receiver; and

WHEREAS, said defendants do not desire this stipulation or anything herein contained to be, or to be construed to be any waiver, qualification, limitation or restriction whatever upon their said appeal from said order;

NOW, THEREFORE, the premises considered, understood and agreed to, it is hereby STIPULATED and AGREED by and between the parties to the above-entitled action that [131] Honorable Walter B. Maling be appointed receiver herein, upon giving a bond in such amount as may be fixed by the Court, and

IT IS hereby FURTHER STIPULATED and AGREED that neither this stipulation or anything herein contained shall in any way affect or abridge the aforesaid appeal, but, on the contrary, said appeal and all rights of said defendants therein are hereby expressly reserved, conserved and continued in the same force and effect as if this stipulation had not been entered into.

Dated this 13th day of February, A. D. 1918.

WM. F. ROSE,

Solicitors for Complainants.

R. T. HARDING and

HENRY E. MONROE,

Solicitors for Defendants.

J. J. DUNNE,

Of Counsel for Defendants.

[Endorsed]: Filed Feb. 16, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[132]

In the Southern Division, District Court of the
United States, in and for the Northern District
of California, Second Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,

Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,

WM. S. NOYES, B. S. NOYES, L. OS-

BORN, JOHN W. F. PEAT and L. M.

DOHERTY,

Defendants.

Receiver's Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Walter B. Maling, of the city and county

of San Francisco, State of California, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto the United States of America, in the sum of Ten Thousand Dollars (\$10,000), lawful money of the United States of America, to be paid to the said United States of America, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of February, 1918.

THE CONDITION of the above obligation is that an order was made on the 20th day of February, A. D. 1918, by the District Court of the United States in and for the Northern District of California, Second Division, appointing the above-named principal Receiver of the Presidio Mining Company, including the Presidio Mine, known as Section Eight, Presidio County, State of Texas, and Section Five adjoining said Section Eight, together with the Presidio mill, and all improvements, appurtenances and equipment connected with said Sections Eight and Five, and all the real and personal property of said corporation of every kind and nature wherever situated, with full power to act in all particulars in the place and stead of the directors and officers of said [133] corporation, pursuant to law in such cases made and provided, and after proper ancillary proceedings have been had

where and when the same shall be required; to take immediate and exclusive possession of said Presidio Mining Company, its office, Room 209, 255 California Street, San Francisco, California, its assets, books, records and papers, to continue, control, carry on and conduct its business in all its ramifications, including the mining, milling, handling its ores, selling its bullion, and to discharge the duties obligatory on said corporation;

To operate said Presidio Mine in and on Section 8, and Section 5, the milling and reduction plant of said corporation, and manage said properties in such a manner as will in his judgment produce the most satisfactory results consistent with the discharge of the duties imposed thereon; to collect and receive all the income therefrom, with full power in his discretion to employ, discharge, fix compensation of any and all agents, attorneys, managers, superintendents and employees as may be necessary to aid in the discharge of his duties;

To make such investigations, institute and prosecute such suits, as may be necessary in his judgment for the recovery of moneys or other assets belonging to said corporation, or for the proper protection of the said properties and trusts vested in him, and to likewise defend all such actions instituted against him as such Receiver, the prosecution or defense of which in his judgment will be necessary for the proper protection of the said property placed in his charge, or benefit, or increase the assets of said corporation; to take any and all steps by ancillary or other legal proceedings required by law in the

proper courts and jurisdiction to obtain full and complete authority to carry out the orders and provisions contained in said order.

NOW, THEREFORE, if the said Walter B. Maling shall faithfully discharge the duties of his office as RECEIVER [134] in the said action and shall obey the orders of the Court herein according to law, then this obligation to be void, otherwise to remain in full force and effect.

WALTER B. MALING. (Seal)

NATIONAL SURETY COMPANY,

[Seal]

By FRANK L. GILBERT,

Its Attorney-in-fact.

The rate of premium on this bond is \$5.00 per thousand; the total amount of premium charged is \$50.00 per annum.

(2—\$.25 Internal Revenue Documentary Stamps attached.)

Cancelled by National Surety Co. New York, Feb. 21, 1918.

This bond is approved this 23d day of February, 1918.

WM. C. VAN FLEET,

U. S. Dist. Judge.

State of California,

City and County of San Francisco,—ss.

On this 21st day of February in the year one thousand nine hundred and eighteen, before me Genevieve S. Donelin, a Notary Public in and for the city and county of San Francisco, State of California, residing therein, duly commissioned and

sworn, personally appeared Frank L. Gilbert known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed February 23d, 1918 at 11 o'clock and 30 min. A. M. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk. [135]

(Title of Court and Cause.)

**Order Permitting Receiver to Invest Surplus Funds
in His Hands in the New (Third) Liberty
Loan.**

Walter B. Maling, Receiver in the above-entitled actions, having petitioned this Court for permission to invest surplus funds in his hands, to the extent of

at least Twenty-five Thousand (25,000) Dollars, in the present (Third) Liberty Loan;

And it appearing that he has on hand the sum of at least Ninety-three Thousand Two Hundred and Forty-seven and 60/100 (93,247.60) Dollars, and that at least Fifty Thousand (50,000) Dollars of said sum is not needed for present purposes of said Receivership;

And it further appearing that although said Receiver has only petitioned for permission to invest Twenty-five Thousand (25,000) Dollars of said amount in said Liberty Loan, that the parties to said action have consented that he may invest Fifty Thousand (50,000) Dollars of said surplus in the said Liberty Loan;

And it appearing to be for the best interests of said receivership that said investment be made;

IT IS HEREBY ORDERED that said Receiver have and he is hereby given permission to invest not to exceed the sum of Fifty Thousand (50,000) Dollars in said Liberty Loan.

Done in open court this 12th day of April, One Thousand Nine Hundred and Eighteen (1918).

WM. C. VAN FLEET,
Judge.

We hereby consent to the above order.

WM. F. ROSE,
Attorneys for Plaintiffs.
R. T. HARDING and
HENRY E. MONROE,
Attorneys for Defendants.

[Endorsed]: Filed April 12, 1918. Walter B. Maling, Clerk. [136]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

PRIMARY SUIT.

No. 196—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

In the District Court of the United States, for the
Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Petition for Permission to Purchase New Engine at Mine.

Walter B. Maling, Receiver in the above-entitled actions, hereby petitions the Court for permission to purchase a new engine at the Mine, and in that behalf states as follows:

That situated on the mining property of the Presidio Mining Company is the reduction works of the Company, consisting of a fifteen-stamp mill for reducing the ores, other crushing and [137] pulverizing machinery, and also transportation machinery, all forming a part of the mill and cyanide plant in which the ores are reduced and treated for the purpose of extracting the silver.

That it requires to run all of this machinery about 240 H. P.

That for the purpose of furnishing power there is situated at the mill and installed therein three engines, two gas engines, one called the small engine, rated at 87 H. P. at the elevation of the Mine, another engine, called the large engine, rated at the elevation of the Mine at 122 H. P., and in addition there is an old steam engine which is used when the gas engines are in need of repair.

At the present time the small engine is carrying a load of about 100 H. P. and the large gas engine a load of about 140 H. P., and thus the 240 H. P. necessary to run all of the machinery is furnished, both engines, however, being overloaded.

It is not practicable to use the old steam engine on account of the cost as it requires a large amount

of fuel oil to keep it running and it is difficult to get the amount of oil necessary for fuel to run this engine. Besides that, the Receiver is informed that the steam engine is unsafe.

The overloading of the two gas engines causes frequent accidents to the engines and compels the mine to shut down at inconvenient times and for unnecessarily long periods. Besides the overloading of these gas engines takes an increased amount of fuel, which could be avoided by putting in a new large engine of 140 H. P., keeping the small engine as a reserve in case of a breakdown of either large engine and doing away with the steam engine entirely.

These conditions at the Mine with reference to the [138] power plant have caused in the last two years two serious breakdowns, the aggregate cost of the two breakdowns to the Company amounting to the sum of about Fifteen Thousand (15,000) Dollars.

That your Receiver has investigated the matter and is informed and believes that at present prices a new 140 H. P. engine, together with the necessary additional machinery to accompany it, can be purchased and installed at a cost not to exceed Twenty Thousand (20,000) Dollars.

WHEREFORE your Receiver prays that he be permitted to expend the sum of Twenty Thousand

(20,000) Dollars, or as much as is necessary, to install a new 140 H. P. gas engine at the Mine.

WALTER B. MALING,
Receiver.

FRANK R. WEHE,
Attorney for Receiver.

We, the undersigned, attorneys for the parties to the above-entitled actions, hereby admit service on us of a copy of the above petition, and hereby consent that the matter may go on the calendar for Monday, June 3d, 1918.

WM. F. ROSE,
Attorney for Plaintiffs.
R. T. HARDING and
HENRY E. MONROE,
Attorneys for Defendants.

[Endorsed]: Filed May 31, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

(Title of Court and Causes.)

Order Permitting Receiver to Purchase New Engine at Mine.

Walter B. Maling, Receiver in the above-entitled actions, having petitioned the Court for permission to purchase a new engine at the Mine, and it appearing that all of the allegations of said petition are true and that it is necessary at this time to purchase and install in the mill at the Mine a new 140 H. P. gas engine at an expense of not to exceed Twenty Thousand (20,000) Dollars, and both parties to the action consenting thereto;

IT IS HEREBY ORDERED that the Receiver be and he is hereby permitted and authorized to purchase and install at the mill at the Presidio Mine, at Shafter, Presidio County, Texas, a new gas engine of 140 H. P. at an expense of not exceeding Twenty Thousand (20,000) Dollars, and he is hereby authorized to pay the purchase price of said engine and all necessary adjuncts thereof and its installation out of the money of said Presidio Mining Company in his hands.

Done in open court this 3d day of June, one thousand nine hundred and eighteen (1918).

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jun. 6, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [140]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

PRIMARY SUIT.

No. 196—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

In the District Court of the United States, for the
Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Petition for Appointment of Auditor.

Walter B. Maling, Receiver in the above-entitled matter, hereby petitions the Court to appoint an auditor for the purpose of auditing the books and accounts of the Presidio Mining Company, and in that behalf states as follows:

That Capt. Wm. S. Overton, a Director and Stockholder in the Presidio Mining Company, has served upon the Receiver a written request for the appointment of an auditor for the purpose [141] of auditing the books and accounts of the Presidio Mining Company, from a period prior to the commencement of the receivership, and it is assumed during the receivership;

WHEREFORE said Receiver prays that this Court make an order authorizing him to appoint an auditor, with full power to examine the books, accounts and reports of the Presidio Mining Com-

pany from such time prior to the receivership as shall be designated by the parties up to and including the whole time of the receivership.

WALTER B. MALING,

Receiver, Presidio Mining Company.

FRANK R. WEHE,

Attorney for Receiver.

[Endorsed]: Filed Nov. 2, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [142]

(Title of Court and Causes.)

Order Permitting Receiver to Appoint Auditor.

Walter B. Maling, Receiver herein, having petitioned this Court for the appointment of an auditor for the purpose of auditing the books and accounts of the Presidio Mining Company, and all of the parties to said action having consented thereto;

IT IS HEREBY ORDERED that the Receiver select and appoint a competent, expert accountant for the purpose of examining and auditing all of the books and accounts of the Presidio Mining Company wherever situated, from such time prior to the Receivership as shall be designated in writing by any of the parties to this action up to and including such time of the Receivership as has expired at the time of such examination.

Done in open court this 13th day of January, one thousand nine hundred and nineteen (1919).

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jan. 14, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[143]

Report of Auditors.

Oct. 4, 1919.

New York	HASKINS & SELLS	San Francisco
Chicago		Los Angeles
Detroit	Certified Public Accountants	New Orleans
Saint Louis	Cable Address "Haskells"	Seattle
Boston		Denver
Cleveland	Crocker Building	Atlanta
Baltimore	San Francisco	Watertown
Pittsburgh		London

October 3, 1919.

Mr. Walter B. Maling,
Receiver, Presidio Mining Company,
San Francisco, California.

Dear Sir:

Pursuant to engagement, we have audited the books and accounts of the Presidio Mining Company for the period from April 1, 1906, to December 31, 1917, and submit herewith eleven pages of comments and the following described exhibits:

EXHIBIT

"A"—General Balance Sheet at August 31, of Years 1906, to 1913, Inclusive, and at December 31, of Years 1914, to 1917, Inclusive.

"B"—Statement of Income and Profit & Loss, by Periods, from April 1, 1906, to December 31, 1917.

“C”—Statement of Payments made to E. G. Gleim Company During the Period, April 1, 1906, to December 31, 1917.

Yours truly,

HASKINS & SELLS. [144]

PRESIDIO MINING COMPANY

COMMENTS ON THE AUDIT

FOR THE PERIOD FROM APRIL 1, 1906, TO
DECEMBER 31, 1917.

PLANT PROPERTY.

MINE.

All San Francisco records of the Company prior to April, 1906, were destroyed by the fire of April 18, 1906, and when new books were opened the Company omitted to set up the capital stock, as well as the mine account.

Subsequently, entries were made on the books charging the mine \$175,000.00, and crediting Capital Stock \$150,000.00, and Profit & Loss \$25,000.00. The Internal Revenue Agent examining the accounts of the Company in connection with Income Tax Returns disallowed the credit to Profit & Loss, and as we have been unable to obtain evidence to indicate the consideration given for the mine or the Capital Stock, for the purpose of this report we have stated the value of the Mine (Section 8) as \$150,000.00.

According to the interlocutory decree No. 196 in the District Court of the United States in and for the Northern District of California, Second Division, “*W. S. Overton et al. vs. Presidio Mining*

Company et al.," dated February 16, 1918, it has been adjudged that Section No. 5 (ownership of which is claimed by W. S. Noyes), belongs to the Presidio Mining Company. The cost value of Section 5, according to the report of the Master in Chancery in the litigation referred to amounts to \$25,099.32. We have therefore charged this amount to Mine account, and credit W. S. Noyes, whose account is included in Exhibit "A" under the caption of Contingent Assets—Accounts Receivable.

BUILDINGS, MACHINERY, AND EQUIPMENT

The following items comprise this account: [145]
Presidio Mining Company

Comments on the Audit, etc.

Capital expenditures 1902 to 1906,....	\$124,247.73
Sundry capital assets.....	38,951.66
Mill	31,037.91
Cyanide installation	33,582.39
Rope tramway	24,772.34
Surface track	7,359.25
Mine power house.....	46,027.19
Club house #2, and Garage.....	3,112.64
New hoist shaft.....	2,986.80
Drill sharpening machine.....	2,114.88
Oliver filter	4,375.96

Total.....\$318,568.75

Capital expenditures prior to 1916, as shown by the records, were eliminated entirely on the books of the Company, and are now taken up again in order to establish the value of Plant property.

Subsequent to 1906, the Company's practice has been to charge capital expenditures partly to asset accounts and partly to operating expenses. All items charged by the Company to expenses are shown above as sundry capital assets. They consist of machinery and of material and supplies for the construction of buildings.

All vouchers for capital expenditures subsequent to April 1, 1906, have been examined by us except those aggregating \$10,507.81 for the construction of the rope tramway. This amount represents part of \$16,000.00 advanced by Gregg & Gleim, and while we were not able to inspect the receipted bills we were allowed to inspect the account of the Presidio Mining Company as shown on Gregg & Gleim's ledger. The findings are summarized as follows:

Rope tramway contract (Arthur Painter	
Tramway Company)	\$ 7,106.15
Lumber	2,015.33
Freight	1,383.18
Sundries	3.15
<hr/>	
Total.....	\$10,507.81

WORKING ASSETS.

According to the Company's practice, physical inventories of the various working assets were taken by employees of the Company as of December 31, 1917, and priced at cost. We tested the prices and verified the extensions and footings. [146]

Presidio Mining Company

Comments on the Audit, etc.

CURRENT ASSETS.

CASH.

The cash on hand was verified by count, and cash on deposit by verifications obtained from the depositories.

All cash receipts at San Francisco consisting of the net proceeds from silver bullion have been checked with the returns of Selby Smelting and Lead Company. Returns for bars No. 5690 to No. 6302 for the period beginning November, 1911, and ended January, 1914, were not on file, but copies were obtained from Selby Smelting and Lead Company. All bullion shipments have been accounted for, and the net proceeds deposited in the bank.

The following deposits appear on the bank statements of the Wells Fargo Nevada National Bank without corresponding cash-book entry:

March 26, 1910.....	\$ 6,000.00
February 25, 1913.....	5,000.00
March 1, 1913.....	5,689.75

Total.....\$16,689.75

The first item is applied against a check of \$6,000.00 drawn March 4, 1910, without cash-book entry. The balance of \$10,689.75 represents payments made by Mr. W. S. Noyes which we have credited to his account. (See page 8 of report of Master in Chancery.)

Under date of September 30, 1913, the cash-book shows an entry of \$3,500.00 for sundry receipts, which were included by the Company in the accounts of the fiscal year ended August 31, 1913, while a like amount was entered as a disbursement and charged to operating account September 6, 1913, and included in the accounts of the fiscal year ended December 31, 1914. Both entries, in our opinion, are fictitious and have been eliminated.

Cancelled checks and bank statements from April, 1906, to December, 1912, were missing. Receipted bills for this period are on file with the exception of some cancelled drafts, and amounts transferred to [147] Shafter, which have been verified with the

Presidio Mining Company

Comments on the Audit, etc.

records kept at the mine. An examination of disbursements and cancelled checks disclosed a shortage of \$15,207.00, which amount was withdrawn during the period from April, 1906, to January, 1913. The details consist of substantially the same amounts shown in Report of Master in Chancery, pages 30, 31, and 32. Of this shortage, \$1,007.00 was paid by L. Osborn during 1917. The remainder of \$14,200.00 has been charged to L. Osborn and is included in Exhibit "A" under Contingent Assets—Accounts Receivable.

The cash receipts at Shafter consist of amounts transferred from the San Francisco office for the payment of all purchases and labor at the mine. These transfers have been verified and are in accordance with the San Francisco records. No

check, however, exists as to sales of supplies, scrap iron, lead ore, and sundry items. Part of the cash receipts and disbursements are recorded in a book called the safe blotter and transferred to the cash-book at the end of the month. This blotter is available only from January, 1912, to date. Cancelled checks of the San Antonio National Bank and bank statements from April, 1906, to November, 1910, were missing.

An investigation of the vouchers disclosed the fact that in various instances the Company paid for the hauling or loading of scrap iron and lead ore, the sale of which was not entered on the Company's books. The following is a list of a portion of such sales as determined by evidence obtained from the purchasers:

Scrap Iron Sales:

April, 1906	\$ 224.36
March, 1907	300.11
April, 1908	144.58
January, 1909	151.62
January, 1909	45.00
December, 1909	208.89
January, 1911	259.09
July, 1911	139.09
April, 1912	117.30
October, 1913	319.26

Total.....\$1,909.30

Lead Ore Sale January, 1913.... 562.41

Total Sales not accounted for....\$2,471.71

Presidio Mining Company
Comments on the Audit, etc.

Additional items unaccounted for are as follows:

Scrap Iron:

August, 1907, loading charges		
paid	\$6.50	
September, 1911, 31,190 lbs.		
hauling charges paid	62.38	
September, 1911, 30,090 lbs. haul-		
ing charges paid	60.18	
June, 1912, 5,420 lbs. hauling		
charges paid	10.84	
January, 1913, 22,360 lbs. hauling		
charges paid	44.72	
September, 1913, 16,730 lbs. haul-		
ing charges paid	33.46	
December, 1913, 26,060 lbs. haul-		
ing charges paid	52.12	\$270.20
	<hr/>	

Lead Ore:

September, 1911, 7,220 lbs. haul-		
ing charges paid	\$14.44	
April, 1912, 19,210 lbs. hauling		
charges paid	38.42	52.86
	<hr/>	<hr/>

Total.....\$323.06

The following estimated values are placed on
above items:

Scrap Iron	\$ 860.00
Lead Ore	2,100.00
	<hr/>

Total.....\$2,960.00

In July, 1913, the Company paid for hauling 26,060, lbs. of lead ore. In the same month appears a cash-book entry for sale of 9.6 tons of lead ore amounting to \$391.74. The amount appears to be exceedingly low considering that the previous shipment of 7,080 lbs. netted \$562.41. No statements of the smelter were available. The check for \$391.-74 was deposited with the Marfa National Bank August 12, 1913. Under the same date, a deposit for \$771.20 appears on the bank statement, and on September 4, 1913, the bank shows a charge of \$771.20. Neither item is entered on the books, and we have not been able to determine the nature of the transaction.

The following is a list of additional ore shipments made from Marfa by the Presidio Mining Company and unaccounted for: [149]

Presidio Mining Company
Comments on the Audit, etc.

Consignee.

El Paso Smelting Works, El Paso,

"

El Paso Smelter Company, El Paso,
Department of Metallurgy, Stanford, California,
El Paso Smelter Works, El Paso,

Date	Lbs.	Maximum Value	
		per ton per	R. R. Way Bill.
May 17, 1910	57,000	\$100.00	
Apr. 13, 1911	7,220	100.00	
Apr. 12, 1912	24,000	100.00	
Dec. 2, 1912	2,000		
Jan. 29, 1913	6,600		

We have not been able to find any entries regarding these shipments on the Company's books. The shipment of December 2, 1912, was probably sent to Stanford University for experimental purposes, and the shipments of April 12, 1912, and January 29, 1913, may refer to shipments shown on pages 4 and 5 of these comments under unaccounted for shipments, although the weights differ.

Assuming that the latter three items are thus accounted for, the value of the remaining items is estimated at \$5,100.00.

The total value of shipments unaccounted for may be summarized as follows:

Sales of scrap iron and lead ore un-	
accounted for as determined by	
evidence obtained from purchasers,	\$2,471.71
Estimated value of scrap iron and lead	
ore shipments for which hauling or	
loading charges were paid and pro-	
ceeds of sale not accounted for	2,960.00
Estimated value of ore shipped from	
Marfa	5,100.00
	<hr/>
Total actual and estimated value not	
accounted for	\$10,531.71
	<hr/>

This amount has not been taken up by us in the accounts.

Additional ore shipments from Marfa are listed below. We have been unable to ascertain whether or not any of these shipments belong to the Presidio Mining Company. [150]

Presidio Mining Company
Comments on the Audit, etc.

Maximum Value
per ton per

Lbs. R. R. Way Bill

Shipped by Fred Driffl to El Paso

Smelting Works.

El Paso:

Feb. 10, 1910..	50,000	\$100.00
Jul. 23, 1910.	56,200	100.00
Oct. 3, 1910.	55,000	100.00
Aug. 4, 1911.	50,000	100.00
Nov. 20, 1911.	60,000	100.00
June 29, 1912.	24,000	100.00
Jan. 13, 1917.	60,000	500.00

Shipped by H. B. Young to El Paso Smelter.

Apr. 28, 1915.	50,000	\$100.00
May 27, 1915.	24,000	100.00
June 19, 1915.	24,000	100.00
July 12, 1915.	51,220	100.00
Dec. 22, 1915.	30,000	100.00
Jan. 15, 1916.	24,000	100.00

Shipped by Kirk and Lavelle to Western Metal
Company,

El Paso:

May 2, 1916.	60,000
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Checotah, Oklahoma:

May 16, 1916.	70,000
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El Paso:

May 26, 1916.	60,000
May 30, 1916.	50,000

Checotah, Oklahoma:

June 8, 1916.	70,000
June 16, 1916.	60,000
July 1, 1916.	70,000
July 6, 1916.	60,000
July 14, 1916.	60,000
July 22, 1916.	90,000
July 25, 1916.	100,000

Shipped by John Heron to J. C. Zozaya,

El Paso:

May 27, 1916.	58,000	\$100.00
June 10, 1916.	55,430	100.00
July 12, 1916.	64,060	

Shipped by C. E. Poer to W. B. Wofford,

El Paso:

Jan. 20, 1917.	61,880
Feb. 7, 1917.	63,860
Feb. 19, 1917.	42,015
Mar. 1, 1917.	49,700
Mar. 20, 1917.	64,670

[151]

Presidio Mining Company,

Comments on the Audit, etc.

Maximum Value
per ton per

Lbs. R. R. Way Bill

Shipped by Raymond Bell to Kansas City Con-
solidated Smelter and Refining Company, El
Paso:

May 1, 1917,	61,000	
Aug. 1, 1917,	80,000	\$100.00
Aug. 29, 1917,	68,000	90.00

Shipped by C. P. Halter to Kansas City Smelting and Refining Company, El Paso:

Aug. 14, 1917.....80,000

With few exceptions, receipted vouchers were found at the mine except that the superintendent's vouchers were not sufficiently substantiated by sub-vouchers. Payments were made from the "Doctor Funds" from March, 1907, to October 31, 1910, averaging \$25.00 per month, and subsequent to October 31, 1910, at an average of \$50.00 per month.

From September, 1911, to the beginning of 1916, the mine boarding-house losses, and from March, 1912, the mill boarding-house losses, have been disbursed on the superintendent's voucher without showing how the various losses were determined.

The following is a list of the more important disbursements, the vouchers for which are not substantiated:

Sept. 1913, voucher #23, Rangers' Expense	
and Board	.....\$260.00
Oct. 1913, voucher #25, Rangers' Expense	
and Board	..... 254.75
Nov. 1913, voucher #23, Foundations for	
tram tower	..... 139.00
Painting tram tow-	
ers	..... 75.00
Foundation for mine	
tram terminal..	40.25
Dec. 1913, voucher #29, Rangers' salary and	
board	..... 251.00
Jan. 1914, voucher #25, Rangers' salary and	
board	..... 257.00

Feb. 1914, voucher # 1, Rangers' salary and	
board	251.00
Mar. 1914, voucher #19, Tramway towers	
labor	164.50

Sundry receipted bills aggregating \$438.10 were found at the mine, which were never entered on the Company's books. [152]

Presidio Mining Company

Comments on the Audit, etc.

In February, 1912, we find a disbursement of \$470.00 on the Shafter cash-book in favor of L. Osborn. The San Francisco Journal shows this amount to be charged to *suspense* and subsequently transferred to Profit & Loss without any explanation. Apparently this amount was paid for 37 acres of land acquired from Ygnesia Brooks by W. S. Noyes, in January, 1912, and subsequently transferred to the Presidio Mining Company. The deed acknowledges receipt of \$370.00, leaving \$100.00 unaccounted for. We have charged the amount of \$470.00 to Capital Expenditures.

December 31, 1913, Voucher #31 shows a payment of \$1,500.00 for one Buick automobile, for which no bill was on file. The voucher refers to checks #582 and #583, which were made out as follows:

#582, January 27, 1914, in favor of E. M.	
Gleim.....	\$ 750.00
#583, January 27, 1914, in favor of J. C.	
Bird.....	750.00
<hr/>	
Total.....	\$1,500.00

Entries are shown in the safe blotter of the receipt of \$245.00 under date of April, 1914, and a disbursement of a like amount marked "Contingent Fund," without explanation. No record of this transaction is shown in the general books of the Company.

CONTINGENT ASSETS—ACCOUNTS RECEIVABLE.

The interlocutory decree necessitated the setting up of certain contingent accounts receivable, which if sustained by the United States Circuit Court of Appeals will become current assets. If, however, the decree should be reversed, these entries should be corrected accordingly. These accounts receivable have been set up to conform with the report of the Master in Chancery, dated November 30, 1918, including, however, all credits on the books of the Company to the account of W. S. Noyes for ore obtained from Section No. 5, which are not stated in the Master of Chancery's report.

The following items comprise the contingent accounts receivable: [153]

Presidio Mining Company

Comments on the Audit, etc.

W. S. Noyes:

Credits for ore obtained from Section

#5	\$170,118.70
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Salaries and director fees disallowed

by Master in Chancery.....	9,210.00
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Commission received from Benton

Bowers on hauling charges dis- allowed	3,195.00
-------------------------------------------------	----------

198 *Presidio Mining Company et al. vs.*

Commission received from boarding-		
house disallowed	250.00	
Commission received from E. G. Gleim		
disallowed	6,200.00	
		<hr/>
Total.....	\$188,973.70	

Less:

Credits for ore included		
above which have not		
been paid	\$110,282.50	
Cost value of section #5	25,099.32	
Salary for month of April,		
1913	450.00	
Cash	10,689.75	146,521.57
		<hr/>
Remainder.....	\$	42,452.13

L. Osborn:

Shortage	\$14,200.00	
Salaries disallowed	5,920.00	20,120.00

B. S. Noyes—Salaries and director fees		
disallowed	2,085.00	
J. W. F. Peat—Salaries and director		
fees disallowed	4,640.00	
L. M. Doherty—director fees disal-		
lowed	45.00	

Total.....\$ 69,342.13

The above accounts do not include accrued interest.

RESERVES.

DEPRECIATION OF BUILDINGS, MACHINERY, AND EQUIPMENT

The reserve for depreciation of the plant and equipment has been based on the life of the mine. It has been estimated that the mine will be exhausted on or about January 1, 1924. The condition of the mine does not permit of any accurate calculation of the extent of the undeveloped ore bodies. [154]

Presidio Mining Company,
Comments on the Audit, etc.

DEPLETION

The depletion of the mine is calculated at the rate of 2-1/2 cents per fine ounce produced, and the yearly totals of fine ounces produced are based on the returns from Selby Smelting and Lead Company.

GENERAL.

The results of the operations for the period from April 1, 1906, to December 31, 1917, are fully set forth in Exhibit "B," which includes the earnings from Section No. 5, and sundry commissions in conformity with the interlocutory decree, and adjustments eliminating from expenses various salaries and directors' fees disallowed by the Master in Chancery, also adjustments to set up various capital expenditures erroneously charged to operating expenses.

In accordance with your request, we have prepared and attach hereto as Exhibit "C" a statement of payments during the years 1906 to 1917, inclusive, to E. G. Gleim Company, who conducted the general store at Shafter. [155]

LIBERTY MINING COMPANY

GENERAL BALANCE SHEET AT AUGUST 31 OF YEARS 1906 TO 1913, INCLUSIVE, AND AT DECEMBER 31 OF YEARS 1914 TO 1917, INCLUSIVE

	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31	DECEMBER 31
	1917	1916	1915	1914	1913	1912	1911	1910	1909	1908	1907	1906
ASSETS												
PLANT PROPERTY:												
Mine,.....	\$175,049.32	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00
Buildings, Machinery, and Equipment,.....	318,558.75	288,749.45	242,178.77	233,461.45	189,243.16	141,815.48	124,247.73	124,247.73	124,247.73	124,247.73	124,247.73	124,247.73
Total Plant Property,.....	\$493,608.07	\$438,749.45	\$392,178.77	\$383,461.45	\$339,243.16	\$291,815.48	\$274,247.73	\$274,247.73	\$274,247.73	\$274,247.73	\$274,247.73	\$274,247.73
INVESTMENTS - UNITED STATES LIBERTY LOAN BONDS,.....	\$ 25,000.00											
WORKING ASSETS:												
Mine Supplies,.....	\$ 25,335.70	\$ 28,158.28	\$ 14,493.35	\$ 9,571.51	\$ 5,244.40	\$ 19,120.03	\$ 19,317.37	\$ 16,891.20	\$ 18,504.91	\$ 18,030.20	\$ 17,614.73	\$ 17,493.84
Mine Supplies,.....	13,798.50	10,299.01	4,123.15	1,052.18	1,881.57	1,153.46	1,425.27	573.05	1,804.80	944.55	993.13	1,419.88
Fuel Oil,.....	3,095.06	4,005.86	3,391.39	3,957.55	2,507.51	1,036.21	1,745.41	1,015.98	1,584.13	1,703.93	529.87	731.24
Coal and Wood,.....	350.24	424.35	505.75	1,042.44	775.75	415.50	477.79	223.16	578.99	711.40	199.58	2,002.63
Total Working Assets,.....	\$ 43,589.50	\$ 43,597.51	\$ 22,514.55	\$ 15,123.79	\$ 11,409.23	\$ 21,735.20	\$ 22,957.84	\$ 19,104.33	\$ 22,772.83	\$ 21,390.19	\$ 19,337.31	\$ 21,547.91
CURRENT ASSETS - CASH,.....	\$108,522.52	\$ 33,652.31	\$ 4,347.25	\$17,512.62	\$ 5,535.55	\$ 30,204.27	\$ 30,530.29	\$ 19,374.82	\$ 29,415.65	\$ 40,848.95	\$ 23,482.85	\$ 32,531.42
DEPRECIATED DEBIT ITEMS,.....	\$ 500.00					\$ 450.00						
CONTINGENT ASSETS - ACCOUNTS RECEIVABLE,.....	\$ 54,342.13	\$ 91,511.45	\$ 87,628.45	\$ 54,531.25	\$ 35,525.35	\$ 11,147.00	\$ 8,847.00	\$ 5,197.00	\$ 4,457.00	\$ 1,890.00	\$ 450.00	\$ 450.00
TOTAL,.....	\$740,122.32	\$588,112.72	\$505,559.14	\$470,729.31	\$392,115.30	\$350,352.95	\$335,592.85	\$319,423.88	\$330,893.22	\$338,375.87	\$317,517.90	\$328,877.06
LIABILITIES												
CAPITAL STOCK - AUTHORIZED 10,000,000 SHARES OF \$1.00 EACH OUTSTANDING 150,000 SHARES,....	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00
CURRENT LIABILITIES:												
Notes Payable,.....			\$ 12,000.00	\$ 25,750.00	\$ 19,000.00							
Accounts Payable,.....				16,054.99	4,061.50							
Balance Due on Subscription to United States Liberty Loan Bonds,.....	\$ 10,000.00											
Accrued Federal Taxes,.....	24,532.14											
Total Current Liabilities,.....	\$ 34,532.14		\$ 12,000.00	\$ 44,814.99	\$ 23,061.50							
DEFERRED CREDIT ITEMS,.....										300.00		
RESERVES:												
Depreciation of Buildings, Machinery, and Equipment,....	\$145,927.59	\$121,989.83	\$103,737.95	\$ 66,410.13	\$ 57,218.99	\$ 57,368.40	\$ 50,429.50	\$ 44,444.33	\$ 38,459.08	\$ 32,473.83	\$ 25,488.58	\$ 20,503.33
Depletion of Mine,.....	70,450.35	55,562.15	39,375.73	23,573.74	10,452.15							
Total Reserves,.....	\$216,388.04	\$177,551.98	\$143,113.68	\$109,983.87	\$ 67,671.14	\$ 57,368.40	\$ 50,429.50	\$ 44,444.33	\$ 38,459.08	\$ 32,473.83	\$ 25,488.58	\$ 20,503.33
PROFIT & LOSS SURPLUS - PER EXHIBIT "B",.....	\$339,202.14	\$250,490.74	\$200,855.15	\$155,930.45	\$141,382.56	\$152,984.55	\$135,253.28	\$124,979.55	\$142,434.14	\$155,503.04	\$141,029.32	\$158,373.77
TOTAL,.....	\$740,122.32	\$588,112.72	\$505,559.14	\$470,729.31	\$392,115.30	\$350,352.95	\$335,592.85	\$319,423.88	\$330,893.22	\$338,375.87	\$317,517.90	\$328,877.06

EXHIBIT "A"

FRASIDLO MINING COMPANY

STATEMENT OF INCOME AND PROFIT & LOSS, BY PERIODS, FROM APRIL 1, 1905, TO DECEMBER 31, 1917.

	YEAR ENDED DEC 31,.....			15 MONTHS ENDED DECEMBER 31,	YEAR ENDED APRIL 31,.....			YEAR ENDED APRIL 31,.....			5 MONTHS ENDED AUGUST 31,	
	1917	1916	1915	1914	1913	1912	1911	1910	1909	1908	1907	1906
SALES:												
Silver Bullion,.....	\$459,514.59	\$397,743.18	\$314,501.43	\$389,893.03	\$184,396.70	227,825.59	\$215,439.70	\$160,963.48	\$183,974.95	\$218,833.11	\$191,092.76	\$ 79,585.09
Lead Ore,.....					391.74			722.60	4,511.55		150.00	
Total,.....	\$459,514.59	\$397,743.18	\$314,501.43	\$389,893.03	\$184,788.44	\$227,825.59	\$215,439.70	\$161,686.08	\$188,486.50	\$218,833.11	\$191,242.76	\$ 79,585.09
OPERATING EXPENSES:												
Labor and Material at Mine,.....	\$147,621.10	\$124,172.95	\$ 94,245.47	\$110,538.39	\$ 51,580.21	\$ 53,751.01	\$ 59,034.02	\$ 51,049.79	\$ 59,843.50	\$ 50,831.98	\$ 55,839.29	\$30,631.52
Labor and Material at Mill,.....	126,019.03	133,261.51	104,589.74	145,961.52	88,799.41	102,844.75	103,150.18	98,733.30	99,932.12	102,025.58	97,610.92	38,624.98
Ore Transportation,.....	8,773.03	8,754.12	8,564.75	20,746.85	13,752.51	17,519.14	10,372.08	18,282.23	16,456.98	17,969.34	15,612.55	7,770.95
Tramway Contract,.....			1,300.00	7,500.00								
Salaries,.....	5,400.00	5,400.00	4,597.50	11,605.00	5,700.00	5,400.00	5,400.00	5,400.00	5,400.00	5,400.00	5,400.00	2,250.00
Automobile Expense,.....	2,185.07	1,647.49	1,529.51	483.30	888.18	209.19						
Bullion Expense,.....	2,540.00	2,540.00	1,891.00	3,600.00	2,420.00	2,540.00	2,540.00	2,540.00	2,540.00	2,540.00	2,540.00	1,100.00
Assay Office Expense,.....	2,254.96	1,639.59	1,275.09	942.75	388.72	651.53	282.75	413.10	383.30	425.63	322.48	160.49
Team Expense,.....	2,142.23	2,113.23	601.34	1,958.17	310.35	507.59	770.92	770.92	128.74	919.30	591.93	273.40
Miscellaneous,.....	17,355.79	13,105.94	15,714.50	13,102.58	5,551.10	5,353.36	3,957.97	1,539.05	1,504.53	1,859.50	3,582.73	588.58
Total,.....	\$314,402.21	\$292,932.93	\$234,509.10	\$315,440.57	\$170,753.79	\$190,999.45	\$193,454.59	\$160,020.40	\$160,669.35	\$192,082.53	\$193,999.91	\$ 81,399.93
GROSS PROFIT ON SALES,.....	\$155,112.48	\$104,812.25	\$ 79,992.33	\$ 73,452.46	\$ 14,024.55	\$ 28,826.13	\$ 21,985.11	\$ 7,665.68	\$ 27,817.15	\$ 26,750.58	\$ 27,242.85	\$ 1,185.16
GENERAL EXPENSES:												
Salaries,.....	\$ 5,400.00	\$ 5,400.00	\$ 5,400.00	\$ 8,410.00	\$ 3,930.00	\$ 3,900.00	\$ 3,900.00	\$ 3,875.00	\$ 3,900.00	\$ 4,275.00	\$ 6,000.00	\$ 2,500.00
Taxes,.....	2,514.29	3,309.67	1,228.10	1,457.50	1,279.28	1,396.91	1,169.65	1,047.84	1,044.35	1,201.25	1,415.15	
Legal and Secret Service,.....	825.00	495.00	554.00	4,014.55	1,033.05	345.80		300.00		985.05		
Insurance,.....				221.40	871.20	1,046.45	1,140.71	737.50	1,500.00	500.00	1,002.75	895.00
Miscellaneous,.....	2,255.03	1,522.39	2,404.08	920.30	710.62	175.88	185.15	156.50	158.45	170.31	184.10	115.72
Total,.....	\$ 10,995.32	\$ 10,727.06	\$ 9,595.18	\$ 15,033.95	\$ 7,844.15	\$ 6,855.04	\$ 5,415.51	\$ 5,116.94	\$ 5,502.80	\$ 7,131.61	\$ 8,502.01	\$ 3,511.72
PROFIT FROM OPERATIONS,.....	\$144,116.16	\$ 94,085.19	\$ 70,397.15	\$ 58,418.51	\$ 6,180.50	\$ 21,950.09	\$ 15,569.60	\$ 1,548.74	\$ 22,314.35	\$ 19,618.97	\$ 11,359.16	\$ 5,326.56
OTHER INCOME CREDITS:												
Commissions Collected by W. S. Noyes,.....				\$ 195.00	1,500.00	1,700.00	1,700.00	1,790.00	1,820.00	940.00		
Miscellaneous,.....					1,020.25							
GROSS INCOME,.....	\$144,116.16	\$ 94,085.19	\$ 70,397.15	\$ 58,613.51	\$ 8,700.75	\$ 23,650.09	\$ 17,269.60	\$ 1,548.74	\$ 24,134.35	\$ 20,558.97	\$ 11,359.16	\$ 5,326.56
INCOME CHARGES:												
Provision for Depreciation of Buildings, Machinery, and Equipment,.....	\$ 23,937.85	\$ 18,251.87	\$ 17,327.83	\$ 19,191.14	\$ 9,850.59	\$ 6,938.82	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 2,493.86
Provision for Depletion of Mine,.....	14,828.20	15,656.12	16,402.29	13,121.59	10,452.15							
Interest,.....		541.61	1,541.33	1,752.79								
Federal Taxes,.....	25,538.70											
Total,.....	\$ 64,304.75	\$ 34,449.60	\$ 35,271.45	\$ 34,065.52	\$ 20,302.74	\$ 6,938.82	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 5,985.25	\$ 2,493.86
NET INCOME,.....	\$ 79,811.41	\$ 59,635.59	\$ 35,125.70	\$ 24,547.99	\$ 1,397.91	\$ 16,711.27	\$ 11,284.35	\$ 1,548.74	\$ 18,149.10	\$ 14,573.72	\$ 5,373.91	\$ 2,832.70
PROFIT & LOSS SURPLUS AT BEGINNING OF PERIOD	\$60,490.74	\$20,855.15	\$15,930.45	\$11,382.55	\$15,984.55	\$13,253.26	\$12,479.55	\$12,434.14	\$15,602.04	\$14,573.72	\$15,373.73	\$15,194.15
PROFIT & LOSS SURPLUS AT END OF PERIOD,.....	\$139,302.14	\$260,490.74	\$200,855.15	\$155,930.45	\$141,382.55	\$152,984.55	\$135,253.26	\$14,979.55	\$142,434.14	\$155,602.04	\$141,029.32	\$158,373.73

= DENOTES FIGURES IN RED.

PAYROLL DEDUCTIONS

STATEMENT OF PAYMENTS MADE BY N. C. CLARK COMPANY DURING THE PERIOD
APRIL 1, 1906, TO DECEMBER 31, 1917

	NINE MONTHS ENDING DECEMBER 31										
	YEAR ENDING DECEMBER 31										
	1917	1916	1915	1914	1913	1912	1911	1910	1909	1908	1907
PAYROLL DEDUCTIONS:											
January.....	\$ 7,754.95	\$ 6,166.25	\$ 4,331.10	\$ 5,170.65	\$ 3,449.40	\$ 3,790.75	\$ 3,473.75	\$ 3,197.45	\$ 3,137.70	\$ 3,067.40	\$ 3,137.00
February.....	5,952.15	5,009.45	4,144.30	4,621.30	3,057.20	3,664.20	3,480.40	3,066.30	2,320.95	3,002.25	2,754.05
March.....	7,132.05	6,137.65	4,095.35	5,000.30	3,190.15	3,518.50	3,434.55	3,293.50	3,290.25	3,141.60	3,066.95
April.....	5,090.55	5,951.00	5,060.75	5,455.25	3,393.45	3,557.40	3,334.15	3,262.60	3,039.05	3,201.40	2,740.70
May.....	7,446.30	6,133.55	5,155.30	4,918.45	3,335.55	3,550.70	3,450.30	3,235.35	3,097.15	3,190.70	3,039.75
June.....	7,401.70	6,267.20	5,059.55	4,787.95	3,311.95	3,532.00	3,336.00	3,022.25	3,085.05	3,151.00	2,814.10
July.....	7,709.75	5,218.05	5,275.95	4,377.00	2,352.50	3,027.65	3,319.35	2,998.75	3,135.40	3,215.35	3,185.50
August.....	7,873.95	6,127.30	5,255.30	4,049.20	4,133.85	4,055.70	3,333.85	3,155.10	3,132.20	3,330.35	3,254.45
September.....	7,532.55	5,017.75	5,318.00	4,546.30	4,538.45	3,703.05	3,314.50	3,175.25	3,069.75	3,129.35	3,111.40
October.....	5,873.35	5,913.25	5,305.75	4,623.15	4,677.45	3,654.15	3,730.55	3,301.15	2,360.60	3,139.35	3,085.30
November.....	6,231.90	5,089.55	5,749.25	3,750.35	4,575.35	3,573.50	3,732.05	3,258.70	2,348.55	3,056.10	3,001.00
December.....	5,444.85	5,771.10	5,125.55	4,044.95	5,093.75	3,541.00	3,729.35	3,523.65	3,127.00	3,341.00	3,210.95
Total.....	\$16,405.75	\$75,194.75	\$52,000.45	\$57,072.10	\$45,715.11	\$44,750.50	\$41,407.30	\$38,518.05	\$35,117.25	\$37,455.95	\$36,372.45
ITEMS:											
January.....	\$ 1,023.94	\$ 995.30	\$ 715.92	\$ 549.40	\$ 402.11	\$ 250.52	\$ 162.31	\$ 157.31	\$ 94.72	\$ 254.47	\$ 175.31
February.....	550.43	791.50	425.34	705.38	737.31	547.34	241.46	133.74	188.21	325.64	295.59
March.....	740.93	338.74	795.15	759.75	579.51	1,053.00	375.36	103.65	352.06	740.95	353.27
April.....	339.99	1,127.30	583.30	1,352.03	818.23	565.65	207.39	462.03	134.49	721.38	280.03
May.....	1,201.19	1,075.57	527.37	1,075.71	579.75	305.55	268.11	199.47	211.74	137.53	177.43
June.....	1,145.53	1,257.35	740.57	657.39	581.38	400.97	414.77	233.01	179.77	109.11	435.16
July.....	1,151.33	935.92	1,334.19	835.11	812.40	349.70	387.32	195.62	243.79	402.22	873.33
August.....	1,119.09	604.31	1,071.54	538.50	1,532.36	227.38	231.37	140.60	379.34	549.89	327.16
September.....	815.44	535.98	1,411.50	507.34	1,152.86	120.55	303.91	391.10	190.71	110.28	404.53
October.....	1,001.92	850.38	369.67	790.93	1,490.34	179.57	235.29	202.70	437.20	195.65	401.22
November.....	1,273.72	714.72	1,185.01	502.45	505.54	504.46	531.29	409.48	48.77	249.32	153.71
December.....	1,225.32	922.77	970.52	311.80	1,038.04	239.45	337.90	531.01	105.48	32.99	221.29
Total.....	\$11,911.89	\$11,159.05	\$12,505.79	\$9,235.59	\$11,220.34	\$4,400.95	\$1,801.97	\$3,333.52	\$2,405.30	\$4,072.94	\$4,109.51

The payroll deductions shown above represent purchases made by employees except that the items from April 1, 1906, to May 31, 1910, include an approximately 1/2 of miscellaneous temporary deductions, the exact amount of which could not be determined owing to the incomplete condition of the records.

[Endorsed]: Filed Nov. 17, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[159]

Report of Auditors.

Oct. 4, 1919.

New York	HASKINS & SELLS	San Francisco
Chicago		Los Angeles
Detroit	Certified Public Accountants	New Orleans
Saint Louis	Cable Address "Haskells"	Seattle
Boston		Denver
Cleveland	Crocker Building	Atlanta
Baltimore	San Francisco	Watertown
Pittsburgh		London

October 2, 1919.

Walter B. Maling, Esq.,
Receiver, Presidio Mining Company,
San Francisco, California.

Dear Sir:

Pursuant to engagement, we have audited the books and accounts of the Presidio Mining Company for the year ended December 31, 1918, and submit herewith three pages of comments and the following described exhibits:

EXHIBIT

"A"—General Balance Sheet, December 31, 1918 and 1917, and Comparison.

"B"—Statement of Income and Profit & Loss for the Years Ending December 31, 1918 and 1917, and Comparison.

Yours truly,

HASKINS & SELLS. [160]

PRESIDIO MINING COMPANY
 COMMENTS ON THE AUDIT
 FOR THE YEAR ENDED DECEMBER 31, 1918.
 BUILDINGS, MACHINERY, AND
 EQUIPMENT.

The increase of \$31,717.32 in this account, as shown in Exhibit "A," is made up as follows:

De La Verque Engine Installation,....	\$19,078.44
Hospital Building,.....	3,253.14
Air Pipes and Fittings,.....	2,329.53
Electric Installation,.....	2,516.73
Automobile.	1,210.00
Mill Improvements.	711.91
Filter #2.	253.71
Compressor.	232.85
Concrete Crossing.	407.85
Miscellaneous Machinery and Equipment	1,602.16
Furniture and Fixtures.	121.00

Total \$31,717.32

All vouchers referring to above charges were examined by us and, in our opinion, constitute proper capital charges.

INVESTMENTS.

The following items are included under this caption:

Second Liberty Loan, 4 $\frac{1}{4}$ % Bonds,....	\$ 25,000.00
Third Liberty Loan, 4 $\frac{1}{4}$ % Bonds,....	60,000.00
Fourth Liberty Loan, 4 $\frac{1}{4}$ % Bonds,....	65,000.00
War Savings Stamps,	834.00

Total \$150,834.00

The securities listed above were verified by inspection.

WORKING ASSETS.

Physical inventories of the supplies on hand were taken by employees of the Company and priced at cost. We tested the prices and verified the extensions and footings. [161]

Presidio Mining Company
Comments on the Audit, etc.

CURRENT ASSETS.

CASH.

The cash on hand was verified by count, and cash on deposit by verifications obtained from the depositories.

CONTINGENT ASSETS—ACCOUNTS RECEIVABLE.

The following items are included under this caption:

W. S. Noyes.....	\$42,577.13
L. Osborn.	20,120.00
B. S. Noyes,	2,110.00
J. W. F. Peat	4,810.00
L. M. Doherty,	45.00

Total \$69,662.13

The above charges are based on Interlocutory Decree Number 196 in the District Court of the United States in and for the Northern District of California, Second Division, *W. S. Overton et al vs. Presidio Mining Company*, dated February 16, 1918.

RESERVES.

DEPRECIATION.

The reserve for depreciation is based upon the life of the mine as estimated by the Company's mining engineer.

DEPLETION.

Provision for depletion of ore bodies has been made at the rate of two and one-half cents per fine ounce produced.

GENERAL.

As requested, we have examined the production records to determine the losses sustained by the Company on account of labor trouble during November and December, 1918, and the influenza epidemic in October and November. [162]

Presidio Mining Company
Comments on the Audit, etc.

We are of the opinion that no loss of consequence can be attributed to the labor troubles. The mill was shut down from October 29 to November 12 on account of the influenza epidemic, and only \$26,146.-95 fine ounces of silver were produced during the month of November, while an average of 45,368.28 fine ounces per month were produced in the remaining eleven months of the year. [163]

PACIFIC MINING COMPANY

GENERAL BALANCE SHEET
DECEMBER 31, 1918 AND 1917, AND COMPARISON

	1918		1917		INCREASE
	1918	1917	1918	1917	
<u>ASSETS</u>					
PLANT PROPERTY:					
Land,.....	\$175,099.32	\$175,099.32	\$		
Buildings, Machinery, and Equipment.	350,286.37	312,568.75		31,717.32	
Total Plant Property,.....	\$525,385.69	\$493,668.07	\$	31,717.32	
INVESTMENTS:					
United States Liberty Bonds,.....	\$150,000.00	\$25,000.00	\$125,000.00		
War Savings Stamps,.....	834.00			834.00	
Total Investments,.....	\$150,834.00	\$25,000.00	\$125,834.00		
WORKING ASSETS:					
Mill Supplies,.....	\$20,080.21	\$25,335.70	\$	5,255.49	
Mine Supplies,.....	17,046.84	13,798.50		3,248.34	
Fuel Oil,.....	2,458.11	3,095.06		636.95	
Coal and Wood,.....	282.35	360.24		77.89	
Total Working Assets,.....	\$39,867.51	\$43,589.50	\$	3,721.99	
CURRENT ASSETS - CASH,.....	\$151,874.87	\$108,522.62	\$	43,352.25	
CONTINGENT ASSETS - ACCOUNTS					
RECEIVABLE,.....	\$59,152.13	\$59,342.13	\$	320.00	
TOTAL,.....	\$837,244.20	\$740,123.32	\$197,501.88		
<u>LIABILITIES</u>					
CAPITAL STOCK OUTSTANDING 150,000					
SHARES PAID UP OF \$1.00 EACH,.....	\$150,000.00	\$150,000.00			
CURRENT LIABILITIES:					
Balance Due on Subscription to					
United States Liberty Loan Bonds, ..	\$	\$10,000.00	\$		
Accrued Federal Taxes,.....	116,855.25	24,532.14		92,323.11	
Total Current Liabilities, ..	\$116,855.25	\$34,532.14	\$	82,323.11	
RESERVES:					
Depreciation,.....	\$177,951.92	\$145,927.69	\$	32,024.23	
Depletion,.....	84,724.51	70,460.35		14,264.16	
Total Reserves,.....	\$262,676.43	\$216,388.04	\$	46,288.39	
SURPLUS,.....	\$408,061.52	\$339,202.14	\$	68,859.38	
TOTAL,.....	\$837,244.20	\$740,123.32	\$197,501.88		

STATEMENT OF INCOME AND EXPENSES
FOR THE YEAR ENDING DECEMBER 31, 1916 AND 1917, AND DECREASE

YEAR ENDING DECEMBER 31,	1916	1917	DECREASE
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REVENUE:

Silver Bullion.....	\$541,670.32	\$49,514.59	\$72,355.63
Lead Ore.....	7,483.94		7,483.94
Total.....	\$549,154.26	\$49,514.59	\$79,839.57

OPERATING EXPENSES:

Labor and Material at Mine.....	\$133,306.24	\$147,821.10	\$14,314.84
Labor and Material at Mill.....	136,531.37	125,019.83	12,512.34
Mine Transportation.....	9,243.11	8,773.55	490.08
Salaries.....	9,455.00	9,400.00	455.00
Automobile Expense.....	1,353.52	2,166.87	822.55
Bullion Expense.....	2,640.00	2,640.00	
Pay Office Expense.....	1,033.09	2,254.95	1,221.87
Team Expense.....	542.34	2,142.23	1,599.89
Miscellaneous Expense.....	19,460.08	17,355.79	2,094.29
Total.....	\$315,569.77	\$314,402.21	\$1,167.56

LOSS PRO FIT ON SALES.....	\$233,724.49	\$155,112.46	\$78,652.01
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GENERAL EXPENSES:

Salaries.....	\$1,516.33	\$9,400.00	\$3,781.67
Receivership Fees.....	6,541.52		6,541.52
Taxes.....	3,516.73	2,516.29	1,102.44
Travel Expense.....	2,500.00	825.00	1,675.00
Donations.....	1,000.00	500.00	500.00
Supplies.....	1,353.34	1,755.03	401.49
Total.....	\$18,632.12	\$10,996.32	\$7,635.80

PROFIT FROM OPERATIONS.....	\$215,132.37	\$144,115.16	\$71,016.21
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OTHER INCOME CREDITS:

Interest.....	\$3,572.85		\$3,572.85
Miscellaneous.....	25.00		25.00
Total.....	\$3,597.85		\$3,597.85

NET INCOME.....	\$218,830.23	\$144,115.16	\$74,714.07
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DEPRECIATION CHARGES:

Depreciation on Plant Building and Equipment.....	\$32,024.23	\$23,937.86	\$8,086.37
Depreciation.....	14,254.13	14,626.20	554.04
Total.....	\$46,288.39	\$38,764.06	\$7,522.33

INCOME BEFORE DEDUCTING FEDERAL

TAXES.....	\$172,541.84	\$105,355.10	\$67,191.74
STATE TAXES.....	103,872.46	26,558.70	77,023.76

PROFIT & LOSS SURPLUS FOR THE YEAR.....	\$38,679.38	\$70,711.40	\$9,832.02
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PROFIT & LOSS SURPLUS AT BEGINNING OF YEAR.....	339,262.14	260,497.74	78,711.40
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PROFIT & LOSS SURPLUS AT END OF YEAR.....	\$408,081.52	\$339,262.14	\$68,879.38
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[Endorsed]: Filed Nov. 17, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [166]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

First Report of Receiver.

Walter B. Maling, Receiver herein, presents the
following as the first report of his receivership:

1. That on the 20th day of February, 1918, said
Court, by Hon. William C. Van Fleet, Judge, en-
tered herein its order appointing said Walter B.
Maling receiver herein, and by said order he was
authorized and directed—

To take immediate and exclusive possession
of said defendant Presidio Mining Company,
its office, Room 209, 255 California Street, San
Francisco, California, its assets, books, records
and papers, to continue, control, carry on and
conduct its business in all its ramifications, in-

cluding the mining, milling and handling its ores, selling its bullion and to discharge all of the duties obligatory on said corporation;

To operate said Presidio Mine in and on Section 8 and Section 5, the milling and reduction plant of said corporation, and manage said properties in such [167] manner as would in his judgment produce the most satisfactory results consistent with the discharge of the duties imposed thereon; to collect and receive all the income therefrom, and for such purpose he was invested with full power in his discretion to employ, discharge, fix compensation of, any and all agents, attorneys, managers, superintendents and employees as may be necessary to aid in the discharge of his duties;

To make such investigations, institute and prosecute such suits as might be necessary in his judgment for the recovery of moneys or other assets belonging to said corporation, or for the proper protection of the said properties and trusts thereby vested in him, and to likewise defend all such actions instituted against him as such receiver, the prosecution or defense of which in his judgment would be necessary for the proper protection of the said property placed in his charge, or benefit or increase the assets of said corporation;

To take any and all steps by ancillary or other legal proceedings required by law in the proper courts and jurisdictions to obtain full and complete authority to carry out the orders and provisions herein contained;

To continue in office pursuant to the terms and under the conditions above mentioned until the final determination of this suit, or until otherwise ordered by said Court.

2. That he was further ordered, within thirty days, to file with the Clerk of said Court a proper undertaking with [168] satisfactory sureties to be approved by the Court, for the sum of \$10,000, conditioned for the faithful discharge of his duties and to account for all funds coming into his hands according to the order of the Court.

3. That immediately upon the entry of said order and in accordance therewith, he duly executed and filed with the Clerk of said court a proper undertaking, with satisfactory surety, which was approved by the said Court, in the said sum of \$10,000, which undertaking was conditioned for the faithful discharge of his duties, and he thereupon duly took the oath as such Receiver and entered upon the duties of said receivership.

4. That he immediately appointed Frank R. Wehe, an attorney, counselor and solicitor of said court, as his attorney, counsellor and solicitor herein, and thereafter and on the 23d day of February, 1918, duly took possession of the office of said Presidio Mining Company and of all of its funds, property, books of account and all papers and other matters recording the business of said corporation in the City and County of San Francisco.

5. That he also immediately appointed Fred C. Handy as his representative, to take possession of, manage and control the property of said corporation in Texas.

6. That thereafter and on the 4th day of March, 1918, together with his said representative, Fred C. Handy, and his said attorney, Frank R. Wehe, he proceeded to the City of El Paso, Texas, and on the motion of and by ancillary proceedings initiated by complainants, the District Court of the United States, for the Western District of Texas, at El Paso, by its order and interlocutory decree duly entered in the ancillary suit No. 114—Equity of W. S. Overton et al., complainants, vs. said Presidio Mining Company, et al., duly appointed him the [169] Ancillary Receiver in said District and State of Texas, with the same power as contained in the order of his appointment here; that he immediately qualified under said order and then proceeded to the town of Shafter, in the county of Presidio, State of Texas, and took possession, charge and management of all of the property of said Presidio Mining Company in the said County of Presidio, State of Texas, a full inventory of which property is annexed hereto and marked Exhibit "A," said Exhibit "A" comprehending all of the property described in said order of February 20th, 1918, entered in this court as the mining and milling property of said Presidio Mining Company.

RECEIPTS.

7. That he also took charge and possession of the following sums of money and bonds:

Bonds, Second Liberty Loan.....	\$ 25,000.00
Cash on deposit in the Anglo & London Paris National Bank, S. F.	\$30,247.60
Cash on deposit in the Wells Fargo Nevada National Bank, S. F.	28,070.67
Cash on deposit in the Marfa National Bank, Marfa, Texas—General account..	30,777.73
Special account	15,300.00
Cash in office at Shafter	1,352.93 \$105,748.93

(NOTE.—In the above item cash in the Marfa National Bank, Marfa, Texas, \$30,777.73, is included the sum of \$10,000 transferred by the Receiver from San Francisco on February 25th, 1918, after taking possession of the said cash in San Francisco, which would leave the net cash as taken possession of by the Receiver the sum of \$95,748.93.)

8. That he has ever since continued in the man-
agreement and control of all of said property and
has maintained and kept in repair the whole thereof,
and is now in possession of the [170] whole
thereof.

9. That he has continued to work and mine and
mill the ores from said property, and the following
is a statement of the production of the same by
months in fine ounces of silver, and the net bullion

value of the product of said mine in cash by months during said receivership from the said 23d day of February, 1918, to and including the 23d day of October, 1918, and also cash received on sale of lead ore:

1918	Ounces.	Av. Sell. Pr.	Cash Received.
Feb. 23 to Mar. 18	38,205.60	\$0.8557	\$ 31,753.22
Mar. 18 to Apr. 18	51,580.37	0.92071	46,192.88
Apr. 18 to May 17	50,421.32	0.99192	48,757.24
May 17 to June 15	50,140.24	0.9949	49,472.12
June 17 to July 16	52,576.66	0.99555	51,004.18
July 19 to Aug. 16	50,874.72	0.995 $\frac{1}{8}$	49,540.01
Aug. 16 to Sep. 17	64,967.56	1.011 $\frac{1}{8}$	64,128.51
Sep. 17 to Oct. 23	45,409.30	1.011 $\frac{1}{8}$	44,733.56
July 25, Lead ore			7,483.94
			<hr/>
			\$393,065.66

(NOTE.—The above cash receipts of bullion are in each instance the net amounts after the Selby Smelting & Lead Co. has deducted the expressage on the bullion from Marfa, Texas, and refining charges.)

10. That at the time of taking possession of said different accounts in said banks in San Francisco, none of said accounts were drawing interest. That arrangements were made whereby interest was paid on \$30,000 of said account on deposit in said Anglo & London Paris National Bank for two months, and arrangements were also made whereby on September 18th, 1918, said account was transferred from said Wells Fargo [171] Nevada National Bank to the Mercantile National Bank of San Francisco, it being arranged with said latter named bank that

your Receiver should have all accommodations without expense in the purchase of foreign exchange for transfer to the Marfa National Bank in order to continue the fund there for the use of the mining operations at Shafter, Texas, and that interest at two per cent per annum should be allowed for daily balances, to be credited as of the 25th day of each month. Under these different arrangements with said banks and on the bonds held by the Receiver, mentioned above and hereafter mentioned, there has been collected on interest account the following sums:

1918.

May 16—First coupon, Second Issue of \$25,000 Bonds	\$ 500.00
Sept. 18—First coupon, Third Issue of \$60,000 Bonds	894.00
Interest on \$30,000 deposit, two months, Anglo and London Paris National Bank	100.28
Aug. 1—Interest on Special Deposit, Marfa National Bank, \$15,300	306.00
Sept. 25—Interest on daily balances, seven days, Mercantile National Bank	27.05
<hr/>	
Total	\$1827.33

11. That there have been miscellaneous receipts as follows:

Sale of old typewriting machine	\$ 25.00
Rebate on Railroad Scrip book and ex- penses of travel by receiver	183.16

From sundry sales at Shafter of scrap iron, etc.	1110.87
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Total	\$1319.03
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[172]

DISBURSEMENTS.

12. That under order of this Court and with the consent of the parties, the Receiver has made the following investments in Liberty Bonds, War Savings Stamps, and United States Loan Certificates, in addition to the \$25,000 of which he took possession at the commencement of his receivership, the place of subscription being mentioned:

Third Issue, San Francisco	\$ 50,000
Third Issue, Marfa, Texas	10,000
Fourth Issue, Marfa, Texas	50,000
Fourth Issue, San Francisco	15,000
War Savings Stamps, June 25, 1918, San Francisco (\$500 par value)	417
War Savings Stamps, June 25, 1918, Marfa, Texas (\$500 par value)	417
U. S. Loan Certificate, Aug. 6, 1918	60,000

Total	\$185,834
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13. That all of said securities, including the \$25,000 Liberty Bonds taken possession of at the commencement of the receivership, except the Fourth Liberty Bonds, which have not yet been received, have been deposited in the Safe Deposit Vaults of the Wells Fargo Nevada National Bank with the understanding that none of said securities shall be taken from the Bank except in the joint presence of the Receiver and agent of the National

Surety Company, the surety on the Receiver's bond.

14. That in May, 1918, with the consent of the parties to said action and upon the order of the Court therefor, there was donated to the Red Cross on its second drive the sum of \$1000.00
[173]

15. That the total expenses for mining, milling, general expense, and supplies at Shafter, Texas, by months, including the entire month of February, 1918, up to and including the month of September, 1918, and the office expense in San Francisco for each of said months, to all of which is attached a comparative statement of the same expenses during the previous year of 1917 for the same months, are as follows:

For the month ending Feb. 28, 1918.

Total mine expense	\$14,087.03
Total mill expense	10,669.35
General expense	2,932.65
Supplies	1,782.82
Plant	1,228.76
San Francisco office	256.05

\$30,956.66

For the month ending Feb. 28, 1917

Total mine expense	\$14,285.40
Total mill expense	10,814.56
General expense	2,254.04
Supplies	652.22
San Francisco,	1,448.45

\$29,454.67

For the month ending Mar. 31, 1918.

Total mine expense	\$13,560.24
Total mill expense	12,901.31
General expense	2,305.78
Supplies	751.05
Plant	15.10
San Francisco office	11,839.99

\$41,373.47

For the month ending Mar. 31, 1917.

Total mine expense	\$12,727.68
Total mill expense	10,530.19
General expense	3,238.65
Supplies	730.95
San Francisco office	1,091.25

\$28,318.72

For the month ending April 30, 1918.

Total mine expense	\$13,219.69
Total mill expense	9,138.90
General expense	2,415.05
Supplies	2,935.78
Plant	150.77
San Francisco office	1,340.01

\$29,200.20

For the month ending Apr. 30, 1917.

Total mine expense	\$13,015.00
Total mill expense	11,699.20
General expense	8,147.67
Supplies	29.53
San Francisco office	889.85
	<hr/>
	\$35,781.25

[174]

For the month ending May 31, 1918.

Total mine expense	\$12,963.23
Total mill expense	11,344.43
General expense	2,218.59
Supplies	1,209.72
Plant	1,426.94
San Francisco office	2,376.42
	<hr/>
	\$31,539.33

For the month ending May 31, 1917.

Total mine expense	\$14,177.14
Total mill expense	9,830.44
General expense	6,298.57
Supplies	4,681.08
San Francisco office	2,247.60
	<hr/>
	\$37,234.83

For the month ending June 30, 1918.

Total mine expense	\$12,211.81
Total mill expense	11,688.23
General expense	2,056.91
Plant	9,260.52
San Francisco office	617.33

\$35,834.80

For the month ending June 30, 1917.

Total mine expense	\$11,527.76
Total mill expense	11,678.32
General expense	11,658.29
Supplies	2,232.99
San Francisco office	1,333.31

\$38,430.67

For the month ending July 31, 1918.

Total mine expense	\$12,828.65
Total mill expense	\$12,051.06
General expense	2,578.93
San Francisco office	767.45

\$28,226.09

For the month ending July 31, 1917.

Total mine expense	\$11,198.19
Total mill expense	11,823.44
General expense	8,776.90
Supplies	8,160.76
San Francisco office	824.75

\$40,784.04

For the month ending Aug. 31, 1918.

Total mine expense	\$12,603.29
Total mill expense	10,425.42
General expense	2,132.78
Supplies	4,372.02
Plant	198.40
San Francisco office	738.18

\$30,470.09

For the month ending Aug. 31, 1917.

Total mine expense	\$14,876.63
Total mill expense	12,106.19
General expense	9,709.84
Supplies	2,359.65
San Francisco office	1,245.20

\$40,297.51

[175]

For the month ending Sept. 30, 1918.

Total mine expense	\$11,112.43
Total mill expense	12,589.03
General expense	2,063.45
Plant	1,047.50
San Francisco office	586.68

\$27,399.09

For the month ending Sept. 30, 1917.

Total mine expense	\$12,239.04
Total mill expense	10,709.67
General expense	14,332.90
Supplies	4,218.23
San Francisco office	1,794.01
	<hr/>
	\$43,293.85

15. That in addition to the above expenditures there has been expended at San Francisco for the month of October to date the sum of.....\$1,253.07

16. That in addition to this last expenditure, the Receiver has remitted to Shafter the sum of\$10,000.00

(NOTE.—In the above accounts the expense of the San Francisco office for March, 1918, during the administration of the Receiver on its face seems unusual. However, included in the amount of \$11,839.99 is the sum of \$10,623 for taxes, which includes a portion of the Income Tax of the Presidio Mining Company for 1917 paid by the Receiver, and also includes traveling expenses of the Receiver, his attorney and representative to Marfa, Texas.

It also should be noted that the disbursements for February, 1918, include both the disbursements of the receivership and those of the Company for that month, which at this time have not been adjusted and will not be until the books are audited.)

SUMMARY OF RECEIPTS FROM THE FORE- GOING ACCOUNTS.

Cash received at the commencement of receivership	\$95,748.93
Bullion receipts during receivership	393,065.66
Miscellaneous receipts	1,319.03
Interest received during receivership ..	1,827.33

Total cash received\$491,960.95

[176]

17. That the total amount of disbursements cannot be summarized at this time so as to show the true balance for the above reason that the February disbursements of the Company and Receiver have not yet been segregated, and for the further reason that the reports for expenditures at the Mine for October have not yet been received.

18. That there was on hand in cash on October 23d, 1918, in San Francisco, the following sums:

Mercantile National Bank	\$31,288.58
Anglo & London Paris National Bank ..	347.88

That there was on hand in Texas on

October 1st, 1918, as appears by the balance sheet received from the Mine on October 15th, 1918, a balance of cash, including a general deposit in the Marfa National Bank and cash

in safe.....	16,068.94
Special Deposit in Marfa National Bank	15,606.00

Total \$63,311.40

(NOTE.—The Marfa Bank balances as they exist at the time of this report cannot be given for the reason that statements will not be received from Shafter until the middle of this month.)

SECURITIES ON HAND.

Liberty Bonds, Second Issue	\$25,000
Liberty Bonds, Third Issue	60,000
Liberty Bonds, Fourth Issue	65,000
War Savings Stamps	834
U. S. Loan Certificates	60,000

Total\$210,834

19. That bullion shipments to Selby Smelting & Lead Co. and in transit cannot be accounted for until reported by the Selby Company. [177]

OTHER PROPERTY IN POSSESSION OF RECEIVER ON OCTOBER 1st, 1918.

20. That annexed hereto and marked Exhibit "B" is an inventory of the real estate, buildings, equipment and machinery, etc., and supplies belonging to the Presidio Mining Company and in the possession of the Receiver on October 1st, 1918, all of which is still in the possession of the Receiver, except supplies used in due course, but the inventory does not comprehend all of the supplies etc. in transit on orders and property at Marfa not yet delivered at the Mine. This would include supplies in the depot at Marfa, a new engine purchased in New York at an expense of \$8500 and other property.

21. That it will appear from the two inventories, Exhibits "A" and "B" that the total cost of

all supplies in Inventory "A" was \$43,867.53 and that of Inventory "B" \$38,422.15, a difference of \$5,445.38. Most of this difference, however, is accounted for in the item of cyanide, there being on hand at the time the Receiver took possession cyanide of the cost price of \$10,023.14 and on October 1st, 1918, cyanide of the cost price of \$4852.90. It was therefore unnecessary to purchase a further supply, and there was on October 1st on hand sufficient cyanide to run over three months.

IMPROVEMENTS.

New Oil Engine.

22. That under order of this Court the Receiver has purchased a new De La Vergne Engine, oil burning type, 144 h. p. for the sum of \$8500. f. o. b. New York. This engine was purchased second-hand, after having been thoroughly inspected and repaired under the direction of mechanical experts in New York employed by the Receiver and pronounced by them to be in good shape. That at the time of the purchase this matter was thoroughly [178] investigated and it was found that a new engine would cost something over \$15,000.

The first mentioned engine is now at the mine and is being installed. It was necessary to purchase this engine for the reason that the engines at the mill were overloaded, and it is estimated that the new engine added to two of the present engines at the mine will not only decrease the overload but will materially cut down the cost of operation and will prevent many stoppages of the mill due to necessary

repair to the old engines on account of the overload, and will dispense with the old steam engine.

New Classifier.

23. That there has also been added and installed an 8-foot Allen Cone for classification purposes to replace a former 5-foot Cone which was too small and not a satisfactory machine in other respects. The new Cone is giving better results.

Electric Hoist.

24. That the East Shaft Hoist which in the past was operated by steam has been converted into an electric driven hoist. Part of this equipment was on the ground when the Receiver took over the property and the balance necessary for the change has been added. This change will cut down the cost of operation on account of the scarcity of wood for the former steam boiler. This matter was in contemplation by the Presidio Mining Company prior to the receivership.

Air Compressor.

25. That on the 400-foot level a 50 h. p. motor and new compressor has been installed and the same is now being wired from the generator. This will provide more air in the lower levels [179] and increase the efficiency of the work in general.

Hospital.

26. That under orders of this Court the Receiver obtained authority to construct a Hospital Building, and this work is now in progress. It is a lath and plaster building, with an operating room, examination and dressing-room, office and bedchamber for the doctor, two rooms that will each hold two hos-

pital beds, one ward room that will hold from four to six hospital beds, bathroom, toilet and diet kitchen. The building in the rear surrounds a patio, around which is plenty of porch room, all under cover. This was a much needed improvement owing to the fact that in case of an accident to any of the employees of the mine or mill the injured person would have to be cared for in his own home, which is usually an adobe shack with practically no ventilation, with dirt floors, crowded and unsanitary. The total cost of the building will be about \$4000. By building this hospital at this time and providing rooms for the doctor, the Company is given the use of a three-room cottage with bathroom, which is owned by the Company and which can be used for a married employee.

New Apartments.

27. That on account of the Draft taking many single men into the Army, it was found necessary to hire married men and to provide quarters. At the new Club House two three-room apartments have been arranged for single rooms, and two bath-rooms built, with bathtubs and toilets provided in each. This has provided comfortable light housekeeping apartments for the bookkeeper and one of the engineers.

28. In addition, a two-room apartment was also arranged for the master mechanic, who was married in June. [180]

29. A new roof has been put upon the cottage occupied by the nightwatchman. On account of the

roof being out of repair the house was almost uninhabitable during stormy weather.

New Map.

30. That material for a new map has been purchased and the engineer at the mine is now engaged in the work of making a correct and up-to-date map of the Mine.

Telephones.

31. That telephones have been purchased for the lower levels, which will be installed so as to give communication to the different parts of the Mine by telephone.

Tramway Repairs.

32. That a heavier sheave wheel for the tramway has been purchased and heavy "I" beams for the mill tramway terminal, all for the purpose of adding to the safety of the system.

Shafter Creek Crossing.

33. That a concrete crossing or dip across Shafter Creek and between Shafter and Marfa has been constructed. This crossing is 455 feet in length and 12 feet wide. It is heavily reinforced where the main current of the creek flows and iron stakes with a cable rail put in at the current points. Along the whole length of the concrete work iron stakes have been placed to mark the location of the crossing. The width of the creek is such that a bridge is not practicable and it is a rare occurrence—only happening during stormy weather—that there is any quantity of water in the creek, but it sometimes happens in time of heavy rains that the creek cannot be crossed for about ten days, thus interrupting

the communication with Marfa, hence the improvement, by means of which the creek will be, ordinarily, passable. The expense of this improvement [181] was shared by the County and the United States, but on the initiative, however, of the officers at the Mine. The cost did not exceed \$400.

Machine Drills.

34. That prior to the possession of the Receiver most of the drilling in the mine was hand drilling, but at the commencement of the receivership the Company management had commenced the installation of machine drills. This has been continued by the Receiver and at the present time the Mine is well equipped with mine drills, which have materially reduced the cost of mining.

GENERAL REPAIRS.

35. That all of the ordinary and extraordinary repairs necessary to the efficiency of the machinery and works at the Mine have been kept up, and with the exception of natural and ordinary depreciation and wear and tear, the property is in first-class shape, and, due to the progress of the times, to some extent better than when possession was taken.

INCREASE IN WAGES.

36. That the greater proportion of the employees at the mine are Mexicans, a large proportion of them ignorant, and while many of them are citizens, they are not patriotic, and the Draft Law caused many of them to cross the Border into Mexico, so that it was necessary to offer inducements to keep this class of laborers. In addition to this con-

dition the railroads had increased wages for unskilled labor and other mining propositions were offering higher wages than were being paid at the mine; and men were drifting away at such a rate that the management was short-handed for labor. Again, the increased price of living had increased the expense of the skilled labor. In view of all [182] these circumstances it was necessary to increase wages at the Mine and a graduated increase was made of the help in the mine and mill with some few exceptions,—that is to say, all employees getting \$1.75 were increased to \$2.00 per day; others 50c per day, making the total increase on the pay-roll of \$1727.50 per month. No increase was given to the Receiver's representative, superintendent, mill foreman, assayer, bookkeeper, night watch or guard, and annexed hereto, marked Exhibit "C," is a list of all the employees, with their nationality, former wages and increase.

GENERAL MATTERS AT THE MINE.

37. That for the purpose of improving the general health of the employees about 350 persons at Shafter have been vaccinated and quite a number inoculated for typhoid, all at the expense of the receivership.

CIVIC MATTERS.

38. That a large proportion of the Mexican population of Shafter, all of whom depend upon the Mine for their support, and which furnish a large proportion of the unskilled labor and some of the skilled, are Catholics, and there is a Catholic

Church at the Mine, with a Priest and Sisters of Charity attending, all of whom do many acts of kindness, both spiritual and material for these people. With this in view and for the purpose of promoting this good work, the Receiver has furnished the Church, parsonage and Sisters' quarters with electric current, and also the privilege of attaching to the water main. The expense of this is slight, and it has pleased the inhabitants of the town to such an extent that the material benefit much exceeds the value of the service.

39. That in addition to this, the Receiver's representative at the Mine, Mr. Handy, has devoted some of his time to [183] taking part in the civic matters of the County in general, except political, and at the last Liberty Loan drive was appointed chairman of the Liberty Loan Committee for the Shafter District of the County of Presidio, and your Receiver is pleased to report that Mr. Handy has not only fulfilled all of his duties at the Mine with more than ordinary ability and tact, but has also won for himself the commendation of the citizens of Marfa and vicinity for his activities on behalf of the community, all of which redounds to the benefit of the mining operations of the Presidio Mining Company.

CHANGE IN PERSONNEL OF EMPLOYEES.

40. Under this heading there are but two important changes to report. The bookkeeper was drafted and a new bookkeeper secured, who is performing all the duties required of him. Also,

although Mr. E. M. Gleim, who was Superintendent of the Mine when the Receiver took charge and who is still in charge, has been efficient under the Receiver, still matters have occurred which have caused your Receiver to believe that it is necessary to require his resignation, and a letter has been written him asking for the same. It is not expected that this will materially effect the management at the Mine for the reason that Mr. Handy is now capable of performing all these duties without the assistance of a superintendent.

ACTIONS.

41. Only one action has been commenced against the Receiver. This is the action of Constance Mills Overton, et al., vs. W. S. Noyes, et al., Equity No. 421, now pending in this Court. Your Receiver was made a party to this action for the reason that he formally refused to bring the action in that it involves an accounting with reference to matters occurring long prior to the receivership, and it is understood that the [184] Receiver was made a party simply for the purpose of obtaining his refusal so as to give complainant the right to sue the Presidio Mining Company.

The Receiver has not been compelled to prosecute or defend any other actions.

AUDITOR AND SIMPLIFICATION OF ACCOUNTS.

42. Demand has been made upon the Receiver to appoint an Auditor to audit the books and accounts of the Presidio Mining Company, and it is

assumed including the accounts of the Receivership, and for this purpose the Receiver has petitioned this Court for the appointment of such auditor, and it is suggested that it is proper that such auditor be appointed and that not only the books and accounts prior to the receivership should be audited, but it is requested that the order be broad enough so as to have the auditor examine and audit all of the accounts of the receivership, and also that the auditor be authorized to suggest a simpler method of accounts, reports, etc. at the Mine for the use of the office in San Francisco. When the Receiver took possession a rather complex system of accounting and reporting was being used by the different officers and has been continued during the receivership. It may be that these are as good as can be devised, but an auditor may possibly simplify the matter with benefit to the receivership and the company.

The audit of the books of the Receiver at this time will permit the Receiver to make a full and complete financial statement of the affairs of the receivership at the conclusion of this year, and will furnish the necessary facts for making the Income Tax Return for the Presidio Mining Company.
[185]

RECEIVER'S AND ATTORNEY'S FEES.

43. Inasmuch as it is probable the receivership will continue through the present year and over into the next year, and that it will be necessary for the Receiver to file an Income Tax return for the

Company covering the net income during the present year, which will include more than ten months of the Receiver's administration thereof as a basis for the income tax, and that it would be but just to the Company's affairs that the present year should have all of the proportionate and proper costs of the receivership for the year included as a deduction in the return, it is suggested that a proportionate amount of the fees of the receiver and his attorney to date be allowed at this time.

WHEREFORE your Receiver prays that all of this report, except the tentative financial statements, be approved and that the Court fix and allow to the Receiver and his attorney a reasonable fee each for their services to date.

Respectfully submitted,
WALTER B. MALING,
Receiver, Presidio Mining Company.
FRANK R. WEHE,
Attorney. [186]

Exhibit "A."

PRESIDIO MINING COMPANY.

INVENTORY of Real Estate, Buildings, Equipment and Machinery, etc., belonging to Presidio Mining Company, and taken over by Walter B. Maling, Receiver, on March 7th, 1918.

Real Estate.

Section 8.	Containing 640 acres.
Section 5.	Containing 640 acres.
Tailings Dump.	Containing 26.41 acres.
Tramway line.	Containing 37.00 acres.
Mill Site.	Containing 73.87 acres.

Buildings.

- 1 Mill Building, galvanized iron sides and metal roof, containing the following machinery and equipment:
 - 1 tramway terminal, with weight boxes.
 - 1 steel ore bin & shaking screens, 550 ton capacity.
 - 1 wooden water tank, 10,000 gallons capacity.
 - 2 condensers.
 - 1 steel hot water tank.
- 15 stamp battery, complete, 1150# stamps.
 - 1 steel battery storage tank, 14'x8'.
 - 2 Dorr thickeners, complete, 30'x10' with motors.
 - 1 Ingersoll-Rand air compressor, 12"x12".
 - 1 Marsh air compressor, 10"x12".
 - 2 circulating pumps, 2½"x3", with motors.
 - 1 cone classifier.
 - 1 Worthington D. C. fire pump, 9"x4"x10".
- 3 Steam boilers, 54 ft. x 16 ft. with feed pumps, etc.
 - 1 Ingersoll-Rand air compressor & Rec. 10"x10".
 - 1 Corliss steam engine, 125 h. p.
 - 1 Westinghouse electric generator, 37 K. W. 115 V.
- 1 General Electric generator, 20 K. W. 115 V.
- 1 De La Vergne oil burning engine, 100 h. p.
- 1 De La Vergne oil burning engine, 160 h. p.
- 2 bucket elevators, 55 ft. lift.
- 2 steel tube mills, each 4'-6"x18'.
- 2 screw classifiers and conveyors.
- 2 Oliver continuous filters, each 11'-6"x14'.
- 1 steel tank for sulphate.
- 1 steel sump tank, 18'x5'.

- 4 steel Pachuca agitating tanks, 14'x28'.
- 2 steel clarifying tanks, each 16'x4'.
- 1—6 comp. metal zinc boxes, with motor.
- 3—6 comp. metal zinc boxes.
- 5—8 comp. wooden zinc boxes.
- 1 Donaldson melting furnace, with motor & blower. [187]

Mill Building (continued).

- 1 reverbatory simplex melting furnace.
- 2 Deming triplex pumps, 4"x6".
- 1 steel oil storage tank, 17 bbl. for melting room.
- 1 steel oil storage tank, 17 bbl. for engine room.
- 1 steel clean up tank, 4'x5'.
- 6 steel fuel oil storage tanks, 109 bbls. each capacity, all with line and countershafts, clutches, pulleys, belting, piping, wiring, etc.
- 1 office building, 3 rooms, with furniture, records, etc.
- 1 supts. residence, 5 rooms & bathroom, with furniture.
- 1 cottage, 4 rooms & pantry, occupied by F. Russell.
- 1 boarding-house building, 4 rooms.
- 1 doctor's office and drug store, 2 rooms.
- 1 cottage, 3 rooms & bathroom, occupied by surveyor.
- 1 cottage, 3 rooms, occupied by doctor.
- 1 cottage, 5 rooms, occupied by R. Speed, guard.
- 1 cottage, 3 rooms, occupied by W. Speed, night-watch.

- 1 cottage, 3 rooms & bathroom, occupied by M. W. Kahoe, malter.
- 1 cottage, 4 rooms & bathroom, occupied by A. Driffil, battery man.
- 1 cottage, 4 rooms & bathroom, occupied by F. H. Pomeroy, Mill man.
- 1 cottage, 4 rooms & bathroom, occupied by M. Shapleigh, Shift boss.
- 1 cottage, 3 rooms & bathroom, occupied by S. E. Manning, engineer.
- 1 cabin, 1 room, occupied by S. E. Manning, engineer.
- 2 club houses, containing 1 social hall, 2 bathrooms, and 17 bedrooms, partly furnished.
- 1 finished adobe garage, new.
- 1 galvanized iron garage.
- 1 corral and sheds.
- 1 shoe shop, rented.

Pumping Plant.

- 1 galvanized pump-house.
- 1—6"x8" Dean triplex pump and water line.
- 1—10 h. p. electric motor, with starting equipment.
- 1 wooden building, containing,
- 2 steam pumps and steam line.
- 1 wooden building for lime.
- 1 wooden building for cyanide.
- 1 wooden building for fire hose and hose cart.
- 1 wagon scales.

At Marfa, Tex. (R. R. Station)

6 steel oil storage tanks, 109 bbls. each capacity.
Mine.

- 1 new metal lath & plaster power-house building, containing,
- 2 De La Vergne oil burning engines, 120 h. p. each, complete with starting equipment. [188]

Mine (continued).

- 1 Ingersoll-Rand Compressor, 15 and 9x15, with receiver.
- 1 electric generator, 90 K. W. with switchboards.
- 1 metal lath & plaster building, for storehouse and shop.
- 1 metal lath & plaster building, pumphouse, with pump and motor.
- 2 cooling water towers and tanks.
- 1 concrete water tank.
- 1 galvanized iron building, containing steel oil storage tank.

CORE DRILL.

- 1 F—3 Calyx drill and equipment, with gas engine, this drill equipped to go 800 feet.

EAST SHAFT HOISTING PLANT.

- 1 wooden head frame, complete.
- 1 galv. iron building containing
 - 1 Gates double steam drum.
 - 1 steam boiler and feed pump.
 - 2 cages, and steel hoisting rope.
- 1 stone building for blacksmith-shop, with forge, drill, press, blower, etc.
- 1 stone building for grinding samples, with gas engine, sample crusher and pulverizer, etc.
- 1 stone building for round house for Ford locomotives.
- 1 galvd. iron building for storage of carbide.

1 galvd. iron building containing rock crushers, ore bin, two oil burning engines, pump and gas engine.

1 tramway terminal complete.

5200 ft. double steel rope tramway and 12 towers to support same.

1 telephone line and instruments, for tramway line.

SOUTH SHAFT HOISTING PLANT.

1 mine office building.

1 cottage for mine foreman, 5 rooms and bath-room.

2 cottages for miners, 3 rooms each.

1 frame cottage, 1 room.

1 map-room building, with office for surveyor, two vacant rooms.

Several adobe shacks, about 20 in number, occupied by Mexicans.

1 wooden head frame and wooden ore bin.

1 building containing,

1—35 h. p. W. C. gas engine, and hoist and steel rope.

1 building containing,

1 drill sharpener, and oil forge.

1 rock garage building.

1 building for carbide storage.

1 building for fuse and caps.

1 wooden building, for general storage purposes.

[189]

JOINT TUNNEL.

1 wooden ore bin.

1 corrall and sheds.

SHAFT NO. 4.

- 1 wooden head frame.
- 1 wooden ore bin, 10 ton capacity.
- 1 building containing,
- 1—6 h. p. gas engine and hoist.
- 1 building for blacksmith-shop.

UNDERGROUND HOIST.

- 1 head frame, wooden.
- 1—6 h. p. gas engine and hoist.

MAGAZINES.

- 3 powder magazines, for powder storage.

SURFACE HAULING SYSTEM.

5200 ft. 24" gauge track.

- 2 Ford motors, used as locomotives.
- 5—2 ton side dump ore cars.

UNDERGROUND WORKINGS.

About 24 miles of tunnels, drifts, cross-cuts, etc., with track, ore cars, buckets, pipe-lines, windlasses, ladders, chutes, mining tools, etc. [190]

PRESIDIO MINING COMPANY.

INVENTORY of Supplies on Hand March 1st,
1918.

Articles.	Amount.	Cost.
MINE.		
Powder,	367 boxes	\$3493.84
Fuse	39500 ft.	209.35
Caps	10200	129.34
Caps-elec.	4600	249.00
Igniters	3000	158.09
Carbide	8000 lbs.	569.66

Articles.	Amount.	Cost.
Lamps, carbide, min- ers,	49	111.74
Coal, blacksmith's	15.35 tons	450.65
Cement,	<hr/>	<hr/>
Drill steel, hand,	130 bars.	724.14
Drill steel, machine,	30 bars	706.20
Pick steel,	10 bars	32.48
Pick handles,	11 doz.	34.21
Hammer handles, 36"	15½ doz.	31.20
Hammer handles, 18"	72 doz.	52.10
Shovels, round pt.	11½ doz.	25.54
Atlantic red oil,	40 gal.	15.12
Cup grease #3	55 gal.	28.35
Capital Cylinder oil,	<hr/>	<hr/>
Summer black oil,	150 gal.	34.17
Polarine,	130 gal.	68.24
Ursa gas engine oil,	<hr/>	<hr/>
Gasoline,	125 gals.	35.63
Coal oil,	442 gals.	68.08
Black pipe, 3"	49 pcs.	606.42
Crusher shoes, Sturte- vant,	2	125.50
Crusher dies,	2	143.50
Crusher cheek plates,	2	24.00
Crusher shoes, E. P. Fdry.	6	215.97
Crusher dies,	3	124.08
Rails,	8	15.60
Splices,	558	22.32
Track cable,	5600 ft.	2521.82
Compressor pump,	1	1316.64

Articles.	Amount.	Cost.
In transit.		
Cotton waste,	2 bales	35.20
Carbide,	700 lbs.	40.95
Ore buckets,	8	320.00
Electric motor, 50 h. p.	1	700.00
Fuse,	3 cases,	130.30
Polarine oil,	1 bbl.	24.81
MILL.	<hr/>	<hr/>
		13594.44

Stamps.		
Boss-heads.	4	155.54
Cams,	1	32.35
Cam-shafts-10st.	3	525.20
Cam-shafts-5st.	3	352.05
Dies,	41	463.22
Shoes,	19	375.97
Tappetts,	4	81.72
Liners, back	18	196.83

[191]

MILL (Continued).

Stamps.		
Liners, end	10	\$58.60
Liners, front	<hr/>	<hr/>
Spouts,	3	65.80
Tube Mills.		
Pebbles	111340 lbs.	1383.95
Steel balls,	19500 lbs.	1113.03
Spirals, conveyor	110	62.66
Cyanide,	26400 lbs.	10023.14
Lime,	27080 lbs.	135.30
Sulphate-Ferrous,	4800 lbs.	210.20

Articles.	Amount.	Cost.
Thickener-gears,	2	72.91
Belt-14"x11 ply, H. S.	2	807.45
Mercury.		
Zinc shavings,	7700 lbs.	2003.14
Borax glass,	4950 lbs.	1124.23
Bi-carb. soda,	2727 lbs.	154.07
Crucibles, melting,	2	67.00
Fire clay,	5 sks.	10.75
Power		
Cylinders, Eng. D-204		
(cylinder heads)	1	600.00
Cylinder linings,	1	215.00
Pistons,	1	230.00
Compressor cylinder,	1	100.00
Compressor pistons,	1	50.00
Miscellaneous parts,		180.90
Cylinder heads, Eng.		
D-398	2	565.92
Cylinder linings,	1	160.00
Pistons,	1	200.00
Compressor Cylinders,	1	150.00
Compressor pistons,	1	60.00
Miscellaneous parts,		180.20
Electric lamps, 25 Watt	40	9.30
Ursa gas engine oil,	4 bbls.	100.00
Capital cylinder oil,	1 bbl.	27.44
Albany compound,	2 bbls.	128.68
Oilite,	3 bbls.	87.60
Cotton waste,	2 bales	36.73
Belt dressing,	25 lbs.	10.97
Transmission rope,	1300 feet	358.90

Articles.	Amount.	Cost.
Babbitt,	100 lbs.	66.03
Cement,	53 sks.	68.11
Salt,	1 ton	16.50
Belts, 4"x5 ply,	75 ft.	31.37
Belts, 6"x6 ply,	96 ft.	74.18
Belts, 8"x6 ply,	110 ft.	100.89
Belts, 10"x8 ply,	170 ft.	170.92
Belts, 10"x7 ply,	110 ft.	141.23
Belts, 12"x8 ply,	110 ft.	225.33
In transit.		
Stamp stems,	4	207.05
Tube mill lips,	12	12.28
Back liners,	10	147.43
Spirals,	9	4.28
Albany compound,	1 bb.	57.30
Belt, Inv. 12"x6 ply,	110 ft.	165.55
[192]		

MILL (Continued).

In transit.		
Belt, 6"x5 ply	100 ft.	62.30
Belt, 4"x4 ply	100 ft.	35.00
Pebbles,	20 L tons.	400.00
End liners,	2	12.65
Boss heads,	2	50.00
Spirals, C. I.	97-	89.44
Semi-steel conv. spirals,	29	13.60
Steel tube mill balls,	32300 lbs.	1426.75
Feed slot liners,	2	29.26
Belt dressing	100 lbs.	42.00
Cotton waste,	2 bales	33.54
Albany compound,	1 bbl.	55.35

Sledge handles,	3 doz.	6.84
Filter screen,	1	151.20
Pebbles,	21 tons	521.96
Fire clay,	10 sks.	10.00

28087.03

Fuel Account.

Wood,	22 cds.	148.50
Fuel oil,	581.9 bbls.	2037.56

2186.06

Total of all supplies, \$43867.53

[193]

Exhibit "B."

PRESIDIO MINING COMPANY.

INVENTORY of Real Estate, Buildings, Equipments and Machinery, etc., Belonging to Presidio Mining Company, on October 1st, 1918.

Real Estate.

Section 8,	Containing 640 acres.
Section 5,	Containing 640 acres.
Tailings Dump,	Containing 26.41 acres.
Tramway Line,	Containing 37.00 acres.
Mill Site,	Containing 73.87 acres.

Buildings.

1 Mill Building, galvanized iron sides and metal roof, containing the following machinery & equipment:

1 tramway terminal, with weight boxes.

1 steel ore bin & shaking screens, 550 ton capacity.

- 1 wooden water tank, 10,000 gallons capacity.
- 2 condensers.
- 1 steel hot-water tank.
- 15 stamp battery complete, 1150 lb. stamps.
- 1 steel battery storage tank, 14'x8'.
- 2 Dorr Thickeners, complete, 30'x10', with motors.
- 1 Ingersoll-Rand air-compressor, 12 $\frac{1}{4}$ "x12".
- 1 Marsh air-compressor, 10"x12".
- 2 circulating pumps, 2 $\frac{1}{2}$ "x3", with motors.
- 1 Allen cone classifier, 8' dia.
- 1 Worthington D. C. fire pump, 9"x4"x10".
- 3 steam boilers, 54'x16', with feed pumps, etc.
- 1 Ingersoll-Rand air-compressor & receiver, 10"x10".
- 1 Corliss steam engine, 125 h. p.
- 1 Westinghouse electric generator, 37 K. W. 115 V.
- 1 General Electric generator, 20 K. W. 115 V.
- 1 De La Vergne oil burning engine, 100 h. p.
- 2 De La Vergne oil burning engines, 140 h. p. each.
- 2 bucket elevators, 55 ft. lift.
- 2 steel tube mills, each 4'-6"x18'.
- 2 screw classifiers and conveyors.
- 2 Oliver continuous filters, each 11'-6"x14'.
- 1 steel tank for sulphate.
- 1 steel sump tank, 18'x5'.
- 4 steel Pachuca agitating tanks, 14'x28'.
- 2 steel clarifying tanks, each 16'x4'.
- 1—6 compartment metal zinc boxes, with motor.
- 3—5 compartment wooden zinc boxes.

5—8 compartment wooden zinc boxes.

1 Donaldson melting furnace, with motor and blower.

1 reverbatory simplex melting furnace.

2 Deming triplex pumps, 4"x6".

1 steel oil storage tank, 17 bbls. for melting room.

1 steel oil storage tank, 17 bbls. for engine room.

1 steel clean up tank, 4'x5'.

6 steel fuel oil storage tanks, 109 bbls. each capacity.

With all line and countershafts, clutches, pulleys, belting, piping and wiring, etc. [194]

1 office building, 3 rooms, with furniture, records, etc.

1 supts. residence, 5 rooms and bathroom, with furniture.

1 cottage, 4 rooms and pantry, occupied by Frank Russell.

1 boarding-house building, 4 rooms.

1 doctor's office and drug-store, 2 rooms.

1 cottage, 3 rooms and bathroom, occupied by surveyor.

1 cottage, 3 rooms, occupied by doctor.

1 cottage, 5 rooms, occupied by R. Speed, Guard.

1 cottage, 3 rooms, occupied by Wm. Speed, Nightwatch.

1 cottage, 3 rooms and bathroom occupied by melter.

1 cottage, 4 rooms and bathroom, occupied by batteryman.

1 cottage, 4 rooms and bathroom occupied by mill foreman.

1 cottage, 4 rooms and bathroom occupied by shift boss.

1 cottage, 3 rooms and bathroom occupied by engineer.

1 cabin, 1 room, occupied by engineer.

1 club house, containing 1 social hall, 2 bathrooms and 9 bedrooms furnished.

1 club house containing 2 three room apartments, 1 two room apartment, 2 bedrooms, 2 bathrooms, all furnished.

1 finished adobe garage.

1 galvanized iron garage.

1 corral and sheds.

1 shoe shop.

Pumping Plant.

1 galvanized pump-house, containing 1-6"x8" Dean triplex pump and water line.

1-10 h. p. motor, with starting equipment.

1 wooden building, containing,
2 steam pumps, and steam line.

Miscellaneous.

1 wooden building, covered with galvanized iron for lime storage.

1 wooden building for cyanide storage.

1 wooden building for fire hose and hose cart.

1 wagon scales.

At Marfa, Texas. (R. R. Station.)

6 steel oil storage tanks, 109 bbls. each capacity, on concrete foundations, with building containing pump and motor.

(Land is rented from railroad company.)

Mine.

Power-house.

- 1 new lath and plaster power-house building, containing, 2 De La Vergne oil burning engines, 120 h. p. each, complete with starting equipment.
- 1 Ingersoll-Rand compressor, 15 and 9x15, with receiver.
- 1 electric generator, 90 K. W. with switchboards, etc.
- 1 electric generator, 15 K. W.
- 1 lath & plaster building containing storeroom and shop.
- 1 lath & plaster building, pump-house, with pump and motor.
- 2 cooling water-towers and tanks.
- 1 concrete water-tank.
- 1 galvd. iron building, containing steel oil-storage tank. [195]

Mine (Continued).

Core Drill.

- 1 F—3 Calyx drill and equipment, with gas engine.

East Shaft Hoisting Plant.

- 1 wooden head frame, complete, with shaft, 2 cages and steel hoisting rope.
- 1 galvd. iron building, containing,
 - 1 Gates double steel drum.
 - 1 steam boiler and feed pump.
 - 1 electric equipment for hoisting purposes.
- 1 stone building containing blacksmith-shop, forge, drill, press, blower, etc.

- 1 stone building for grinding samples, with gas engine, sample crusher and pulverizer, etc.
- 1 stone building for roundhouse for Ford locomotives.
- 1 galvd. iron building for storage of carbide.
- 1 galvd. iron building containing two rock crushers, ore bin, two oil burning engines, pump and tramway gas engine.
- 1 tramway terminal complete.
- 5200 ft. double steel rope tramway, and 12 towers to support same.
- 1 telephone line and instruments, for tramway line.

South Shaft Hoisting Plant.

- 1 mine office building and furniture, and mine map.
- 1 cottage for mine foreman, 5 rooms and bathroom.
- 2 cottages for miners, 3 rooms each.
- 1 frame cottage, 1 room.
- 1 map-room building, with new map, with office for surveyor, two vacant rooms.

Several adobe shacks, about 20 in number, occupied by Mexicans.

- 1 wooden head frame complete, with hoisting cable, and wood ore bin.
- 1 building containing,
 - 1—35 h. p. W. C. Engine and hoist.
- 1 building containing,
 - 1 drill sharpener, and oil forge, blower, and emery-wheel.
- 1 rock garage building.

- 1 building for carbide storage.
- 1 building for fuse and caps storage.
- 1 wooden building for general storage purposes.

Joint Tunnel.

- 1 wooden ore bin.
- 1 corral and sheds.

Shaft No. 4.

- 1 wooden head frame.
- 1 wooden ore bin, 10 ton capacity.
- 1 building containing,
 - 1—6 h. p. gas engine and hoist, with steel cable.

Underground Hoist.

- 1 wooden head frame.
- 1—6 h. p. gas engine and hoist, with steel cable.

[196]

Magazines.

- 3 powder magazines, for powder storage.

Surface Hauling System.

- 5200 ft. 24" gauge track.
- 2 Ford motors used as locomotives.
- 5—2 ton side dump cars.

Underground Workings.

About 24 miles of tunnels, drifts, crosseuts, etc.
with track, ore cars, buckets, pipe-lines, air
lines, windlasses, ladders, chutes, telephone
lines, mining tools, wheelbarrows, etc.

Also 50 h. p. motor and compressor and receiver,
just installed. [197]

PRESIDIO MINING COMPANY.

Inventory of Supplies on Hand October 1st, 1918.

Articles.	Amount.	Cost.
MINE.		
Powder	342 boxes	\$3728.00
Fuse	17700 ft.	114.55
Caps	16800	240.25
Caps—Electric	4600	249.00
Igniters	3000	158.09
Carbide	700 lbs.	50.80
Coal—Blacksmith's	11.25 tons	315.45
Drill Steel—hand	130 bars	724.14
Drill Steel—machine	18 bars	134.45
Pick Steel	5 bars	16.55
Pick Handles	6 doz.	54.00
Hammer Handles—36"	6 doz.	36.00
Hammer Handles—18"	72 doz.	52.10
Atlantic Red Oil	1 bbl.	23.65
Summer Black Oil	50 gals.	10.00
Polarine	102 gals.	28.60
Oilite	2.5 bbls.	72.50
Black Pipe—3"	49 pcs.	570.00
Crusher Shoes—Sturte-		
vant	2	125.50
Crusher Dies	1	71.75
Crusher Cheek Plates	2	45.00
Toggle Bearings	12	27.28
Toggles	10	95.63
Crusher Shoes—E. P.		
Fdry.	6	215.97
Crusher Dies	3	124.08

Articles.	Amount.	Cost.
Belt—16"x6 ply	52 ft.	104.88
Splices	279	11.16
Track Cable	5600 ft.	2521.82
Compressor Pump	1	1316.64
Wire Rope (Tram)	1	1634.94
Hoisting Cable	600 ft.	170.14
Ore buckets	6	263.00
Electric Motor — 50		
H. P.	1	700.00

IN TRANSIT.

Summer Black Oil	2 bbls.	22.88
Ursa Gas. Engine Oil	2 bbls.	69.30
Belt—16"x6 Ply.	52 ft.	107.02

\$14,205.12

MILL

Boss-Heads	3	114.18
Cams	3	149.25
Cam Shafts—10 stamp	1	175.05
Cam Shafts— 5 stamp	2	234.70
Dies	12	191.05
Shoes	17	337.65
Tappetts	3	61.29
Liners Back	5	72.50
Liners End	18	120.60
Stems	3	164.03
Spouts	3	65.80
Liners, Discharge, Feed		
End, Shell	1 set	1000.00
Lips Feed	9	11.40
Rollers	4	294.33

Articles.	Amount.	Cost.
MILL (Continued)		
Tires	1	75.00
Pebbles	89660 lbs.	1383.95
Steel Balls	10200 lbs.	586.50
Spirals Conveyor	26	25.65
Spirals Classifier	199	155.25
Cyanide	13000 lbs.	4852.90
Lime	95670 lbs.	574.00
Sulphate—Ferrous	2400 lbs.	105.60
Thickeners—Gear	2	72.91
Zinc Shavings	3150 lbs.	693.15
Borax Glass	2950 lbs.	931.90
Bi-carbonate Soda	9650 lbs.	509.50
Fire Clay	8 sks.	8.00
Acid—H. C. L.	2 c. b.	27.70
Screens	1 set	167.39
Worms	1	19.83
Worm Gears	2	215.48
Wire	15000 ft.	21.95
Belt—14"x7 Ply	1	380.25
Caps Bearing	3	4.45
Furnace Linings	4 sets	200.00
Cylinders Eng. D-204	1	600.00
Cylinder Linings	1	215.00
Pistons	1	608.65
Compressor Cylinder	1	50.00
Miscellaneous Parts		180.20
Cylinder Heads Eng.		
D-398	1	182.96
Cylinder Linings	1	160.00
Pistons	2	472.89

Compressor Cylinder	1	150.00
Compressor Piston	1	60.00
Miscellaneous Parts		180.20
Electric Lamps, 25 watt.	155	32.55
Capital Cylinder Oil	1 bbl.	27.44
Albany Compound	2 bbls.	130.20
Oilite	6 bbls.	174.30
Belt Dressing	15 lbs.	6.30
Transmission Rope	_____	_____
Babbitt	100 lbs.	66.03
Salt	1 ton	4.10
Belt—4" x5 Ply	100 ft.	46.80
Belt—6" x6 Ply	115 ft.	80.50
Belt—8" x6 Ply	110 ft.	100.89
Belt—10"x8 Ply	100 ft.	100.00
Belt—10"x7 Ply	110 ft.	141.23
Belt—12"x8 Ply	110 ft.	225.33
Belt—12"x6 Ply	110 ft.	165.55
Belt—14"x6 Ply	65 ft.	154.90
Glass	12000 lbs.	60.00

IN TRANSIT.

Stamp Stems	4	291.40
Ursa Gas Engine Oil	10 bbls.	346.50
Zinc Shavings	5000 lbs.	1039.40

20059.51

FUEL ACCOUNT

Wood	35-7/8 cords	124.21
Oil	1008.7 bbls.	4033.31

[199]		4157.52
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TOTAL OF ALL SUPPLIES.

MINE	\$14205.12
MILL	20059.51
FUEL ACCOUNT	4157.52

\$38422.15

[200]

Exhibit "C."
**LIST OF EMPLOYEES OF PRESIDIO MIN-
ING CO.**

October 10, 1918.				
Position.	Number.	Nationality.	Wage.	Increase.
Superintendent	1	White	450.00 per	None
Mill Foreman	1	"	300.00 "	None
Engineer—Surveyor	1	"	175.00 "	15.00 per month
Assayer	1	Mexican	125.00 "	None
Bookkeeper	1	White	150.00 "	None
Mine Foreman	1	"	225.00 "	25.00 per month
Mine Shift Boss	1	"	150.00 "	15.00 "
Mine Shift Boss	2	Mexicans	3.00 day	.50 " day
Mill Shift Boss	2	White	5.00 "	.50 "
Battery Foreman	1	"	5.00 "	.50 "
Battery Helpers	3	Mexicans	2.65 "	.25 "
"	3	"	2.25 "	.25 "
Tube Mill Operators	3	"	2.25 "	.25 "

Position.	Number.	Nationality.	Wage.	Increase.
" " Helpers	3	"	2.00 "	" "
Filter Tender	1	"	2.00 "	" "
Treatment Men	3	"	2.00 "	" "
Precipitation Men	2	"	2.00 "	" "
Dryer & Melter	1	White	4.00 "	" "
Master Mechanic	1	"	5.50 "	" "
" " Helper	1	Mexican	2.50 "	" "
Mill Engineer, Chief	1	White	5.00 "	" "
" "	1	"	4.00 "	" "
" " Helpers	1	Mexican	3.50 "	" "
" " Helpers	3	"	2.00 "	" "
Mill Blacksmith	1	"	2.75 "	" "
Carpenter	1	White	4.00 "	" "
" " Helper	1	Mexican	2.50 "	" "
Janitors	2	"	1.75 "	" "
Cartman	1	"	1.75 "	" "
Laborers	4	"	1.75 "	" "

Position.	Number.	Nationality.	Wage.	Increase.
Mine Engineer, Chief	1	White	5.00	“
“ “ Helper	1	Mexican	1.75	“
Hoist Engineer	1	“	4.00	“
“ “	1	“	2.75	“
“ “	1	“	1.75	“
Mine Blacksmith	1	“	3.25	“
“ “ Helper	1	“	1.75	“
“ Repair Man	1	“	2.00	“
“ “ Man Helper	1	“	1.75	“
Motor Ore Car Driver	1	“	2.25	“
“ “ Brakes	1	“	1.75	“
Tool Sharpener	1	“	2.00	“
Tool “ Helper	1	“	1.75	“
Machine Drill Men	10	“	2.50	“
“ “ Helpers	10	“	1.75	“
Miners	20	“	1.75	“
Muckers	50	“	1.75	“

Position.	Number.	Nationality.	Wage.	Increase.
Carmen	30	"	1.75 "	.25 "
Station Tenders	6	"	1.75 "	.25 "
Sample Grinder	1	"	1.75 "	.25 "
Mine Nightwatchmen	3	"	1.75 "	.25 "
Tool Nippers (Boys)	3	"	1.00 "	.25 "
Crusher Men	4	"	1.75 "	.25 "
Tramway Foreman	1	White	5.50 "	.50 "
Asst. to Foreman	1	Mexican	2.25 "	.25 "
Engineer, Tramway & Crush.	1	"	2.75 "	.50 "
Cable Tender & Lineman	1	"	1.75 "	.50 "
Mine Terminal Men	4	"	1.75 "	.50 "
Mill Terminal Men [201]	3	"	1.75 "	.25 "
Weigher (Boy)	1	"	1.50 "	.25 "
Truck Driver	1	"	1.75 "	.25 "
Nightwatch, Mill Bldgs.	1	White	105.00 Mo.	None
Guard	1	"	130.00 "	"
Total amount of increase per month of				
30 days.....				\$1727.50

[Endorsed]: Filed Nov. 2, 1918. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [202]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

PRIMARY SUIT.

No. 196—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

In the District Court of the United States, for the
Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

Stipulation Allowing Fees of Receiver and His Attorney.

Walter B. Maling, Receiver herein, having filed in said Court first above mentioned, his report of his proceedings as such Receiver, from the 23d day of February, 1918, and also having therein asked said Court for an allowance to himself and his attorney, Frank R. Wehe, Esq., on account of their services as such Receiver and attorney herein, covering the year 1918, in order that the expenses of the receivership may be treated as deductions from the net income of such receivership during this fiscal year; [203]

AND IT APPEARING that the above-named defendants and each of them, have heretofore consistently opposed and objected to the appointment of any Receiver in said cause; and that the appointment of said or any Receiver in said action was and is contended by said defendants to be without any authority or jurisdiction in said Court to make such appointment, and is without any foundation in either the pleadings or the proof or records in said cause, to justify the same; and that the said defendants have preserved for review on appeal by the Circuit Court of Appeals, for the Ninth Judicial Circuit, each and all of their said objections to the appointment of said or any Receiver;

AND IT ALSO APPEARING that on account of the probability that said Court may not be able to hear said record until after the close of the fiscal year on account of the illness of the Judge of said

Court who is familiar with all of the said matters, and who appointed said Receiver;

NOW, THEREFORE, IT IS HEREBY STIPULATED that nothing in this stipulation contained shall be, or be construed to be any waiver, surrender, modification, estoppel, or limitation of any kind or character upon said defendants' said objections, and /or upon the full right of said defendants, or each or any of them, to insist in all proper places and at all proper times upon their said objections to the appointment of said or any Receiver, and/or upon any proceedings based upon said or similar objections that said defendants, or any or either of them, may hereinafter be advised to take;

AND IT IS FURTHER HEREBY STIPULATED that the sum of Four Thousand Two Hundred Seventy and 76/100 (\$4,270.76) Dollars is a reasonable sum to be allowed said Receiver as such fees from the 23d day of February, 1918, to the 31st day of December, 1918, and that a like sum is a reasonable sum to be [204] allowed said Frank R. Wehe for his fees as attorney during the same period, and that any Judge of said Court may make an order to that effect, and that thereupon said Receiver may draw from the funds now in his hands the said sums and pay the same to himself and his said attorney as above stipulated.

Dated this 11th day of December, A. D. 1918.

WM. F. ROSE,

Attorney and Solicitor for Complainants.

R. T. HARDING and

HENRY E. MONROE,

Attorneys and Solicitors for said Defendants.

J. J. DUNNE,

Of Counsel.

It is so ordered.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Dec. 11, 1918. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [205]

In the Southern District of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,

Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Supplement to First Report of Receiver.

Supplementing the report of the Receiver, filed herein on the —— day of October, 1918, the following is added thereto:

Commencing on page 8, and being paragraph 15, of said report, it was intended by the Receiver to report the total expenses for mining, milling, general expense and supplies at Shafter, Texas, by months, for the month of February up to and including the month of September, 1918, together with the office expense in San Francisco for each of said months, and to attach thereto a comparative statement of the same expense during the previous year of 1917 for the same months, so as to satisfy the Court of the probability, judging alone from the comparative expense accounts, that the administration of the Receiver was efficient, and that the expense of the management of the property under the Receiver did not exceed that of the management of the Company during a corresponding period in 1917.

However, it has since been discovered that in taking the items from the office books and papers the error was made of considering capital expenditure as expenses, and also in treating [206] supplies purchased by the Company as an item of expense, when as a matter of fact they are capital investments and become expenditures only when they are used. This was done to the extent that the Receiver was credited with items for current expense that were really the use of supplies on hand

at the time of taking over the property by the Receiver and thus were not really expenses of the receivership, and likewise by making like charges against the current expense statements of the Company account of 1917 and thus increasing the apparent expenses.

Since that time the Receiver has had a table of the comparative statements of operating and administering expenses for the period of February 1st, 1917, to October 31st, 1917, and February 1st, 1918, to October 31st, 1918, prepared by an expert, after a careful examination of the books and reports in the office, and the following is a copy of such statement:

FEBRUARY		
	1917	1918
Mine Expense	\$14,285.40	\$14,087.03
Mill Expense	10,814.56	10,669.35
General Expenses, Shafter..	2,254.04	2,932.65
Expenses, San Francisco ...	1,448.45	256.05
	<hr/>	<hr/>
Total	\$28,802.45	\$27,945.08
MARCH		
	1917	1918
Mine Expense	\$12,727.68	\$13,560.24
Mill Expense	10,530.19	12,901.31
General Expenses, Shafter..	3,238.65	2,305.78
Expenses, San Francisco ...	1,091.25	1,222.45
	<hr/>	<hr/>
	\$27,587.77	\$29,989.78

APRIL

	1917	1918
Mine Expense	\$13,000.15	\$13,219.69
Mill Expense	11,699.20	9,138.90
General Expenses, Shafter..	8,147.67	1,686.18
Expenses, San Francisco ...	889.85	629.20
	<hr/>	<hr/>
	\$33,736.87	\$24,673.97
Less Improvements	2,923.44	
	<hr/>	<hr/>
Total	\$30,813.43	\$24,673.97

MAY

	1917	1918
Mine Expense	\$14,177.14	\$12,963.23
Mill Expense	9,830.44	11,344.43
General Expenses, Shafter..	6,298.57	2,218.59
Expenses, San Francisco ...	2,247.60	2,376.42
	<hr/>	<hr/>
	\$32,553.75	\$28,902.67
Less Improvements	3,720.10	
	<hr/>	<hr/>
Total Costs	\$28,833.65	\$28,902.67

JUNE

	1917	1918
Mine Expense	\$11,527.76	\$12,211.81
Mill Expense	11,678.32	11,688.23
General Expenses, Shafter..	11,658.29	2,050.66
Expenses, San Francisco ...	1,333.31	617.33
	<hr/>	<hr/>
	\$36,197.68	\$26,568.03
Less Improvements	8,914.23	
	<hr/>	<hr/>
Total Costs	\$27,283.45	\$26,568.03

JULY

	1917	1918
Mine Expense	\$11,198.19	\$12,828.65
Mill Expense	11,823.44	12,051.06
General Expenses, Shafter..	8,776.90	2,578.93
Expenses, San Francisco ...	824.75	767.45
	<hr/>	<hr/>
Total	\$32,623.28	\$28,226.09
Less Improvements	5,695.52	
	<hr/>	
Total Costs	\$26,927.76	\$28,226.09

AUGUST

	1917	1918
Mine Expense	\$14,876.63	\$12,603.29
Mill Expense	12,106.19	10,425.42
General Expenses, Shafter..	9,709.84	2,132.78
Expenses, San Francisco ...	1,245.20	738.18
	<hr/>	<hr/>
Total	\$37,937.86	\$25,899.67
Less Improvements	9,709.84	
	<hr/>	<hr/>
Total Costs	\$28,228.02	\$25,899.67

SEPTEMBER

	1917	1918
Mine Expense	\$12,239.04	\$11,112.43
Mill Expense	10,709.67	12,589.03
General Expense, Shafter ..	14,332.90	2,063.45
Expenses, San Francisco ...	1,794.01	523.88
	<hr/>	<hr/>
Total	\$39,075.62	\$26,288.79
Less Improvements	10,572.54	
	<hr/>	<hr/>
Total Costs	\$28,503.08	\$26,288.79

OCTOBER

	1917	1918
Mine Expense	\$15,644.22	\$ 9,851.70
Mill Expense	12,281.86	10,508.90
General Expense, Shafter ..	9,451.27	4,831.17
Expenses, San Francisco ...	871.00	585.28
	<hr/>	<hr/>
	\$38,248.35	\$25,777.05
Less Improvements	6,918.13	
	<hr/>	<hr/>
	\$31,330.22	\$25,777.05

RECAPITULATION.

TOTAL COSTS	1917	1918
February	\$ 28,802.45	\$ 27,945.08
March	27,587.77	29,989.78
April	30,813.43	24,673.97
May	28,833.65	28,902.67
June	27,283.45	26,568.03
July	26,927.76	28,226.09
August	28,228.02	25,899.67
September	28,503.08	26,288.79
October	31,330.22	25,777.05
	<hr/>	<hr/>
	\$258,309.83	\$244,271.13

It will be noted that the above statement includes all expenses which are properly included as capital investments, except such as become operating expense, and does not comprehend the total disbursements.

FINANCIAL STATEMENT.

That at the time of making said first report said Receiver was unable to furnish a complete finan-

cial statement during the time covered by it, but said expert has also prepared a financial statement from February 23d, 1918, when the Receiver took charge, until October 31st, 1918, which follows, and is hereby submitted as a part of this report: [210]

STATEMENT OF RECEIPTS AND DIS-
BURSEMENTS FOR THE PERIOD FEB-
RUARY 23d to OCTOBER 31st, 1918.

Funds on Hand at Commencement of Receivership.
1918.

Feb. 23—Anglo & London Paris National	
Bank	\$30,247.60
Wells Fargo Nevada National	
Bank	28,070.67
Marfa National Bank (check-	
ing)	20,777.73
Marfa National Bank (special)	15,300.00
Cash on hand in safe at Shafter	1,352.93
	<hr/>
	\$95,748.93

Receipts During Receivership.

1918.

Feb.	28 ..	\$31,753.22	6.00		
		Bullion	Misc.	Int. Earned	Ore. Sales
Mar.	31 ..	46,192.88	128.15	49.32	
Apr.	30 ..	48,757.24	728.87	550.96	
May	30 ..	49,472.12	208.70		
June	30 ..	51,004.18	136.26		
July	30 ..	49,540.01	25.00		7,483.94
Aug.	31 ..	64,128.51	11.25	306.00	
Sept.	30 ..	44,733.56	74.80	921.05	
Oct.	31 ..	45,026.03	3.07	104.28	
		<hr/>	<hr/>	<hr/>	<hr/>
		430,607.75	1,322.10	1,931.61	7,483.94

Summary of Receipts.

Bullion Receipts	\$430,607.75
Miscellaneous	1,322.10
Interest earned	1,931.61
Ore Sales	7,483.94

Total \$441,345.40

[211]

Disbursements During Receivership.

		Paid at San Francisco	Mine Operating Exps.	Total Amt. Expenses
1918.				
Feb.	23/28 ..	\$ 50.00	\$ 21,737.79	\$ 21,787.79
Mar.	21 ..	11,960.35	29,467.75	41,428.10
Apr.	30 ..	1,340.01	27,702.76	29,042.77
May	30 ..	2,376.42	25,768.05	28,144.47
June	30 ..	617.33	33,464.67	34,082.00
July	31 ..	792.45	22,425.65	23,218.10
Aug.	31 ..	738.18	27,650.68	28,388.86
Sept.	30 ..	586.68	24,883.71	25,470.39
Oct.	31 ..	585.28	28,440.50	29,025.78
		<hr/>	<hr/>	<hr/>
		\$19,046.70	\$241,541.56	\$260,588.26

Summary of Receipts and Disbursements.

Cash on hand at commencement of Re- ceivership	\$ 95,748.93
Receipts during Receivership	441,345.40
Total	<hr/> \$537,094.33
Total disbursements	260,588.26
Balance	<hr/> \$276,506.07
Amount invested in Liberty Loan Bonds and W. S. S.	185,834.00
Balance on hand October 31st, 1918	<hr/> \$ 90,672.07

The above amount of \$90,672.07 was on October 31st, 1918, deposited in the following Banks:

Mercantile National Bank	\$10,842.86
Bullion in transit	45,026.03
Marfa National Bank (checking account)	18,849.30
Marfa National Bank (special account)	15,606.00
Anglo & London Paris National Bank	347.88
<hr/>	
Total	\$90,672.07

[212]

It is further reported that pending the hearing on the report of the Receiver herein, the parties stipulated that the Receiver should receive during the year 1918 for the fees of himself and his attorney the sum of Four Thousand Two Hundred and Seventy and 76/100 (4,270.76) Dollars to be paid to each, which stipulation was in writing, and it was further stipulated that the same might be presented to any Judge of this court and an order made thereon, owing to the absence of the presiding Judge of this court.

That such order was made on the 11th day of December, 1918, and the Receiver has paid to himself the said sum of Four Thousand Two Hundred and Seventy and 76/100 (4,270.76) Dollars and to his attorney, Frank R. Wehe, a like sum, out of the funds of said Receivership.

WHEREFORE your Receiver prays that said report as modified by this supplement be approved and that the said order and stipulation permitting

the payment of said fees to him and his attorney be ratified.

Respectfully submitted,
WALTER B. MALING,
Receiver.

FRANK R. WEHE,
Attorney for Receiver.

[Endorsed]: Filed Dec. 28, 1918. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[213]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 196—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,
vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Stipulation Inviting Judge to Visit Mine.

IT IS HEREBY STIPULATED by and between
the parties that the Hon. W. C. Van Fleet, Judge
of said court, is respectfully invited to visit the
premises in controversy, the Presidio Mine, at
Shafter, Texas, and that the expenses of his visit

shall be considered a charge against the Receivership in the action and shall be allowed the Receiver in his accounts therein rendered.

Dated this 27th day of February, one thousand nine hundred and nineteen (1919).

WM. F. ROSE,

Attorney for Plaintiffs.

R. T. HARDING and

HENRY E. MONROE,

Attorneys for Defendants

J. J. DUNNE,

Of Counsel for Defendants.

So ordered.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 3, 1919. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[214]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,

Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Notice of Filing Receiver's Account.

To Complainants and Their Solicitor, Wm. F. Rose,
Esq., and to Defendants and Their Solicitors,
Messrs. Harding and Monroe, and J. J. Dunne:
Gentlemen:

I hereby deliver to you a copy of the second report of the receiver from October 31, 1918, to and including the 31st day of October, 1919, and notify you that on Monday, the 15th day of December, one thousand nine hundred and nineteen (1919), at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, and at the courtroom of said court, I will call the same to the attention of the Court and ask that a hearing be had thereon.

Dated this 10th day of December, one thousand nine hundred and nineteen (1919).

FRANK R. WEHE,
Attorney for Walter B. Maling, Receiver Presidio
Mining Company. [215]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Second Report of Receiver.

Walter B. Maling, Receiver herein, presents this as the second report of his receivership:

1. That he filed his first report herein on the — day of October, 1918, with a financial statement and report therein from the date of his appointment to the 31st day of October, 1918, and he renders this report and account for the period covering the time from the 31st day of October, 1918, up to and including the 31st day of October, 1919.

2. That during all of the time covered by this report he has continued in possession of and in charge of the property of the Presidio Mining Company and has continued to operate the mining claims of the Company.

3. That during all of the time of his receivership he has to the best of his ability conducted and managed the said trust in good faith, as economically as conditions would permit, and for the best interests of the parties to said action and as ordered by the Court. [216]

4. That he has continued as his representative at the mine and in charge of the operations thereof in Texas, Mr. F. C. Handy, and has employed at the mine in charge of its various departments skilled men experienced in the line of work of which each was respectively in charge.

5. That weekly and monthly reports of the operations at the mine have been sent to the company's office in this city, and the same have been filed and kept open to the inspection of all of the

parties to said action, and that all of the operations at said property and all of the business and proceedings of said receivership have been recorded in said office, and kept in such shape as to be open to the inspection and information of all the parties to said action.

FINANCIAL STATEMENT.

That there was on hand on October 31st, 1918, as a balance in cash on hand at the date of the last report, the sum of \$90,672.07, deposited in the following banks:

Mercantile National Bank.....	\$10,842.86
Bullion in Transit.....	45,026.03
Marfa National Bank (checking account)	18,849.30
Marfa National Bank (special account) ..	15,606.00
Anglo & London Paris National Bank....	347.88

Total.....\$90,672.07

There was also on hand at said time, invested in Liberty Loan Bonds, War Savings Stamps and Treasury Certificates, the sum of.....\$185,834.00

And also bonds on hand at the commencement of the Receivership, in the sum of 25,000.00

Total.....\$210,834.00

[217]

278 *Presidio Mining Company et al. vs.*

Receipts from November 1st, 1918, to October 31st,
1919, inclusive.

Bullion Receipts:

1918		
Nov. 30.....	\$26,146.95	
Dec. 31.....	44,737.24	
1919		
Jan. 31.....	44,177.95	
Feb. 28.....	46,964.86	
Mar. 31.....	45,911.59	
Apr. 30.....	46,308.82	
May 31.....	49,424.55	
June 30.....	45,459.29	
July 31.....	46,222.85	
Aug. 31.....	46,173.68	
Sep. 30.....	52,796.86	
Oct. 31.....	50,898.71	\$545,223.35

San Francisco Miscellaneous Receipts:

1918		
Mar. 31.....	\$5.55	5.55

Miscellaneous Receipts at Mine on Sale
of Scrap and other Miscellaneous
Property:

1918		
Nov. 30.....	\$752.22	
Dec. 31.....	664.25	
1919		
Jan. 31.....	39.33	
Feb. 28.....	28.30	
Mar. 31.....	9.00	

Apr. 30.....	176.55	
May 31.....	13.00	
June 30.....	502.15	
July 31.....	10.35	
Aug. 31.....	14.85	
Sept. 30.....	33.60	
Oct. 31.....	158.30	2,401.90

Interest on United States Securities and
Bank Balances:

1918

Nov. 30.....	1,373.13
Dec. 31.....	167.85

1919

Jan. 31.....	175.00	
Feb. 28.....	503.84	
Mar. 31.....	1,403.95	
Apr. 30.....	1,453.80	
May 31.....	651.95	
June 30.....	59.05	
July 31.....	647.89	
Aug. 31.....	415.52	
Sept. 30.....	1,379.49	
Oct. 31.....	1,493.92	9,725.39

[218] Total Receipts.....\$557,356.19

Statement of Mine Disbursements, Including
Operating and Supply Costs.

1918

Nov. 30.....	\$30,946.72
Dec. 31.....	29,244.94

1919

Jan. 31.....	27,803.21	
Feb. 28.....	25,443.86	
Mar. 31.....	27,994.08	
Apr. 30.....	24,060.21	
May 31.....	27,154.86	
June 30.....	28,393.90	
July 31.....	27,660.52	
Aug. 31.....	22,747.72	
Sept. 30.....	26,159.60	
Oct. 31.....	26,327.35	\$323,936.97

Statement of Expenses Paid at San Francisco.

1918

Nov. 30.....	\$ 619.91
Dec. 31.....	785.75

1919

Jan. 31.....	640.00	
Feb. 28.....	731.75	
Mar. 31.....	1,241.76	
Apr. 30.....	589.47	
May 31.....	583.25	
June 30.....	635.78	
July 31.....	875.91	
Aug. 31.....	598.43	
Sept. 30.....	591.30	
Oct. 31.....	701.70	8,595.01

Statement of Other Expenses.

Dec. 1918. Receiver and Receiver's Attorney fees to December 31st, 1918, allowed by Court on stipulation of the parties 8,541.52

Income Tax Payments (Paid under Protest:)

Mch. 1919—1st Installment, \$28,750.

June " —2d Installment, 28,750.

Sept. " —3rd Installment, 20,631.69 78,131.69

Expenses of Litigation:

Dec. 1918—Fee of Master, as allowed by the Court..... 2,500.00

[219] Amount carried forward.... \$421,705.19

Amount brought forward.... \$421,705.19

Expenses of Auditor:

That there was paid out under order of the Court to Haskins & Sells, as expenses of the audit:

Mch. 1919.....\$550.

Apr. " 525.

May " 510.14

June " 707.

July " 632.26

Sept. " 250.00 3,174.40

Also expended for furniture and fixtures in San Francisco office:

May, 1919..... 171.50

June " 49.00 220.50

Total Disbursements.....\$425,100.09

SUMMARY OF RECEIPTS AND
DISBURSEMENTS.

Receipts.

Bullion	\$545,223.35
San Francisco Miscel- laneous.....	5.55
Mine Miscellaneous	2,401.90
Interest	9,725.39

\$557,356.19

Disbursements.

Administration Expenses

San Francisco.....	\$ 8,595.01
Mine operating expense ..	323,936.97
Receiver and Attorney ..	
Fees	8,541.52
Income Tax Payments ...	78,131.69
Expenses of Litigation...	2,500.00
Expenses of Auditor.....	3,174.40
Furniture and Fixtures..	220.50

425,100.09

Net income from October 31st, 1918, to
and including October 31st, 1919....\$132,256.10
[220]

SECURITIES.

Securities on hand October 31st, 1918,
consisting of Liberty Loan Bonds, War
Savings Stamps and Treasury Certifi-
cates \$210,834.00

In addition to the above your Receiver
purchased the following securities:

1919

Feb. 28—U. S. Interim Cer- tificate, bearing $4\frac{1}{2}\%$ in- terest	\$45,000.	
Accrued interest from Jan. 16, 1919	238.56	45,238.56

Apr. 30—Victory Loan Bonds purchased in Texas.....	35,000.00
-------------------------------------------------------	-----------

May 9—Victory Loan Bonds purchased in San Francisco.....	45,000.00
-------------------------------------------------------------	-----------

July 11—U. S. Certificates of indebtedness bearing $4\frac{1}{2}\%$ interest	\$45,000.
Accrued interest from July 1, 1919	55.48

Total.....	\$381,128.04
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Of the above securities the following
were redeemed by the Government and
the cash received by your Receiver:

1918

Nov. 22—Loan Certificate bought Aug. 6, 1918.....	\$60,000.
------------------------------------------------------	-----------

1919

July 11—U. S. Interim Certifi- cates Feb. 28, 1919.....	45,238.56	105,238.56
------------------------------------------------------------	-----------	------------

Balance U. S. Securities now on hand.....	\$275,889.48
Total amount of U. S. Securities pur- chased between October 31st, 1918, and October 31st, 1919.....	\$170,294.04
Total amount redeemed during same period	105,238.56
<hr/>	
[221] Balance.....	\$ 65,055.48

RECAPITULATION.

Cash on hand October 31st, 1918.....	\$ 90,672.07
Receipts from October 31st, 1918, to and including October 31st, 1919....	557,356.19
<hr/>	
Total.....	\$648,028.26
Total Disbursements.....	425,100.09
<hr/>	
Balance	\$222,928.17
Less amount invested in U. S. securi- ties during time of account.....	65,055.48
<hr/>	
Balance cash on hand Oct. 31st, 1919...	\$157,872.69
Represented by the following items:	
Deposited in Mercantile National	
Bank of San Francisco.....	\$ 76,399.93
Bullion in transit (cash subsequently) ..	50,898.71
Marfa National Bank (checking ac- count)	13,986.40

Marfa National Bank (special ac-	
count)	16,236.48
Anglo & London Paris National Bank..	351.17

Total.....\$157,872.69

Total cash and securities on hand October 31st,
1919:

Bonds, etc.,	\$275,889.48
Cash on hand.....	157,872.69

Total.....\$433,762.17

IMPROVEMENTS.

During the receivership a number of improvements have been made at the mine under order of the Court, and the following is a concise statement of the principal improvements with costs:

De La Vergne Engine Unit No. 3.

New De La Vergne Engine Unit No. 3 purchased for the [222] purpose of replacing the old steam engine at the mine, which necessitated the removal of the steam engine, reconstruction of the building foundations for building, and foundations for engine, and the following includes the cost of the engine, labor, hauling, freight, foundations for engine, etc., the items of which are found in the reports on file and in the different vouchers and pay-rolls, and being distributed over many months:

Materials	Labor	Freight	Hauling	Express	Total
\$11,905.40	1612.80	1473.07	807.70	50.57	15,849.54

The above comprehends the costs which are applied to the engine proper.

It was deemed advisable by your receiver, after consultation with the parties to the action and the advice of Mr. W. S. Noyes, that it would be for the best interests of the trust to purchase said engine, which was a second-hand de la Vergne engine, in New York, which was offered at the price of \$8500, a new engine of the same type costing at that time in New York \$15,000. In making the purchase your receiver employed competent engineers in New York to make an examination of the engine and to only accept its delivery if in a condition satisfactory to them. In addition, after the engine was shipped, an engineer was employed from the De la Vergne Works in New York, taken to the mine, and it was there inspected by him and pronounced practically as good as new, so that it is apparent by the above account that the engine set up and in running order cost but little more than the first cost of a new engine in New York, making a large saving to the Company. [223]

Added Installation Costs.

That the installation of this new engine necessitated the purchase of new material for the power house at the mill, consisting of a new line shaft with pulleys, clutches, bearings, belt pits, foundations, etc., the cost of the whole being as follows, as per the vouchers and pay-rolls distributed over several months during the construction and now on file:

Materials	Labor	Hauling Freight	Express	Total
\$6785.96	\$861.90	\$682.77	\$286.40	\$8617.03

Power-house Building.

The new engine also necessitated the construction of a new building, with floors, changes to engines

D-398 and D-204, with muffle-pits, exhausts, etc., taking down steam plant, etc., costs of which are as follows, as per vouchers and pay-rolls distributed over several months and on file:

Materials	Labor	Freight	Hauling	Express	Total
\$1709.96	\$2288.61		\$82.60		\$4081.17

Allen Cone.

That a new Allen Cone was purchased, the cost of which as per vouchers on file was as follows:

Materials	Labor	Freight	Hauling	Express	Total
Cone	\$600.00	(No extra labor	\$39.96	\$14.03	\$711.91

Lumber, etc. 57.92 furnished)

Electrical Equipment in Mine Power-house and East Shaft-house.

That there has been added to the equipment of the property a new electrical equipment in the mine power-house and East shaft house, with transmission lines, transformers, etc. and [224] underground compressor and motor, the cost of which as per vouchers and pay-rolls on file was as follows:

Materials	Labor	Freight	Hauling	Express	Total
\$7164.43	\$710.70	\$325.96	\$150.92	\$28.89	\$8380.90

Increased Wages to Workmen.

In the month of November the situation at the mine became critical on account of the loss of workmen and discontent with the then going wages. The management at the mine was at a disadvantage in holding its labor on account of the fact that labor in railroad work and other fields of labor in Presidio County had increased to such an extent that

the ordinary laborer at the mine could quit and get much higher pay at those places. The result was such that it was jeopardizing the running of the plant, whereupon your Receiver, with the consent of the parties to the action, authorized another raise in wages similar to the raise reported at the last report. The reports have not been received to show what the actual aggregate raise will amount to, but it is estimated by your Receiver that it will be somewhere between \$1500 and \$2000 per month. It was considered by your Receiver to be necessary to make this raise in order to maintain the operations at the mine, and on account of the high cost of living to those employed at the mine, and so as to meet higher wages paid in the vicinity.

Audit.

That under order of this Court a complete audit of the books of the Company in this City and at the Mine from the date of their opening after the fire in 1906 to the date thereof was made by Haskins & Sells, which report is on file. [225]

Your Receiver further reports that the fees of himself and his attorney have been paid to the 31st day of December, 1918; that neither have received any fees whatever for the year 1919. That the latest act of Congress passed as a war measure with reference to income tax on corporations is still in force, but it is rumored that the same may be reduced for the next year, hence it is proper that in making out the income tax statement covering this year's income, that all of the costs of the receivership of this year should be paid so as to make the

same a deduction on the income tax statement, and it is therefore advisable that the Court fix the fees of the Receiver for himself and his attorney for the year 1919.

WHEREFORE your Receiver prays that said report be approved, and that the fees for himself and his attorney be fixed by the Court and ordered paid from the funds on hand.

Respectfully submitted,
WALTER B. MALING.

FRANK R. WEHE,
Attorney.

[Endorsed]: Filed Dec. 10, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [226]

(Title of Court and Cause.)

**Defendants' Objections to Receiver's Second
Report.**

Now come the defendants above named, and in particular the defendant, the Presidio Mining Company, and object to the allowing of Walter B. Maling, the Receiver herein, and to the approval of the account of his report, dated the 10th day of December, 1919, and filed herein on the 10th day of December, 1919; and in this regard these defendants respectfully represent to this Court:

That the interlocutory order and decree appointing Walter B. Maling the Receiver herein was made and entered on the 20th day of February, 1918.

That the interlocutory decree determining the legal and equitable rights of the parties hereto was

made and entered on the 16th day of February, 1918.

That thereafter, and in due time, appeals were taken by these defendants from both of said decrees to the United States Circuit Court of Appeals, for the Ninth Circuit, and that on stipulation of the parties and the order of said Court, both appeals were heard together and upon the same record.

That in and by said interlocutory decree made and entered on the 16th day of February, 1919, a certain interlocutory injunction was kept in full force and effect.

That on the 27th day of October, 1919, the said Circuit Court of appeals filed its opinion in the matter of said appeal directing a final decree to be entered in this Court in accordance with said opinion, and further directing that the interlocutory injunction be dissolved and the Receiver discharged.

That the complainants have filed in said Circuit Court of Appeals a petition for diminution of record, and that in consequence [227] thereof the mandate of said Court has been stayed.

These defendants further represent to this Honorable Court that in the original and in all subsequent complaints, and on various motions made by them in open court, the complainants sought the appointment of a Receiver herein; but that on each and every occasion when the complainants sought the appointment of such Receiver, these defendants, and each of them, resisted such appointment with all the power at their command.

That after this Honorable Court had filed its opinion and decision herein directing among other things, the appointment of a Receiver but before the appointment of such Receiver, these defendants filed herein their petition and motion, and notice of motion to reopen this cause, and with all the power at their command opposed and resisted the appointment of a Receiver herein upon the ground that the appointment of such Receiver would be erroneous and unlawful, and not necessary for the protection of the rights of the complainants; but the complainants, with all the power at their command again urged and insisted upon the appointment of a Receiver herein.

These defendants further represent to this Honorable Court that when under the aforesaid circumstances, the appointment of a Receiver is finally determined to be erroneous, that such Receiver is compelled to return the property without deduction of any kind to the person from whom it has thus unlawfully been taken; and if the fees and expenses of such Receivership are to be paid at all, they are to be paid, not out of the fund which has thus wrongfully come into the hands of the Receiver, but by the parties litigant who have caused such Receiver to be appointed.

These defendants, for the reasons aforesaid, object therefore: [228]

(1) To the allowance and payment of any fees of said Receiver either for himself or for his attorney out of the fund now in his possession.

(2) The disbursements of the Receiver set forth on page 5 of said Report and Account and recapitulated on page 7 thereof include the sum of \$450 per month for twelve months, since the filing of the Receiver's last account and report, paid to F. C. Handy, an assistant or deputy employed by said Receiver, and \$100 per month for the same period of twelve months paid to Florence M. Handy, a bookkeeper employed by said Receiver, making a total of \$6600; that said sums are strictly expenses of receivership and were not to any extent whatsoever expenses that would have been incurred by these defendants had there been no receivership; but, on the contrary, the services for which said payments were made would have been and previous to the appointment of said Receiver were, performed by the duly elected officers of the corporation, Presidio Mining Company.

(3) The said disbursements of said Receiver also include traveling expenses amounting to \$826.56, Clerk's fees amounting to \$15, Premium on Receiver's Bond amounting to \$50 and the sum of \$3699.40 paid to Haskins and Sells, accountants, (said latter sum being incurred upon the insistence of the complainants), all of which sums are expenses of said Receivership, and no part of which would have been incurred or paid except for said receivership.

(4) That no part of said sums above specified, nor of the compensation now asked for by said Receiver for himself and his attorney for the period since the filing of said Receiver's last account, are

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT, and L. M. DOHERTY,
Appellants,
vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

VOLUME II.
(Pages 293 to 558, Inclusive.)

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Southern Division.

FILED

AUG 10 1922

F. D. MONCKTON,

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT, and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

VOLUME II.
(Pages 293 to 568, Inclusive.)

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Southern Division.

properly or legally payable out of, or deductible from, the funds of the defendant, Presidio Mining Company. [229]

WHEREFORE this defendant prays that the said sums hereinbefore referred to, be deducted from the operation and administration expenses of the defendant, Presidio Mining Company, and be not allowed, and that no fees be allowed for said Receiver, either for himself or his attorney, otherwise than to be paid by the Complainants herein.

Respectfully submitted,

PRESIDIO MINING COMPANY, a Corporation,

WM. S. NOYES,

B. S. NOYES,

L. OSBORN,

JOHN W. F. PEAT and

L. M. DOHERTY,

Defendants.

By R. T. HARDING and

HENRY E. MONROE,

Their Solicitors.

J. J. DUNNE,

Of Counsel.

Due service and receipt of a copy of the within defendants' objections to receivers' second report, is hereby admitted this 22d day of December, 1919.

FRANK R. WEHE,

Attorney for Receiver.

[Endorsed]: Filed Dec. 22, 1919. Walter B. Maling, Clerk. [230]

(Title of Court and Cause.)

**Order Confirming Second Report and Account of
Receiver and Allowing Compensation to Said
Receiver and His Attorney.**

Walter B. Maling, Receiver herein, having heretofore presented his second report and account of his receivership covering the period from the end of his first account, October 31st, 1918, to and including October 31st, 1919, and also having applied therein for compensation for himself and his attorney Frank R. Wehe, for the calendar year 1919; and the matter duly coming on to be heard on this day on the objections to said account made by defendants herein, and all of said parties being present at said hearing represented by their counsel, and said objections having been fully considered by the Court; and it appearing to the Court that said accounts are correct and that said Receiver has fully obeyed all of the orders of the Court to him issued, has fully accounted for all of his receipts and disbursements during said period covered by said account, and that the sum of Five Thousand (5000) Dollars is a reasonable sum to be allowed said Receiver for compensation during the period from the 31st day of December, one thousand nine hundred and eighteen (1918), to and including the 31st day of December, one thousand nine hundred and nineteen (1919), and a like sum of Five Thousand (5000) Dollars is a reasonable fee to be allowed the said attorney of said Receiver for the same period;

IT IS NOW THEREFORE ORDERED that all acts and things done by said Receiver, as well as his said accounts herein, be and they are hereby approved and confirmed, and that he be allowed as [231] compensation for himself the said sum of Five Thousand (5000) Dollars, and that the said attorney for the said Receiver be allowed as his fee as attorney for said Receiver a like sum of Five Thousand (5000) Dollars, both to be in full for all services rendered in this matter by said Receiver and his said attorney during said period of one (1) year, and that said Receiver be and he is hereby authorized to pay both of said sums from the funds of said trust now in his hands.

Done in open Court this 6th day of January, One thousand nine hundred and twenty (1920).

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jan. 6, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [232]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,
vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,
Defendants.

Third Report of Receiver.

Walter B. Maling, Receiver herein, presents this as the third report of his receivership.

1. That he filed his first report therein on the 30th day of November, 1918, with a financial statement and report therein from the date of his appointment to the 31st day of October, 1918. That on or about the 10th day of December, 1919, he filed his second report and account herein for the period covering the time from the 1st day of November, 1918, to the 31st day of October, 1919, inclusive, and that he now renders this report and account of his receivership for the period covering the time from 1st day of November, 1919, to the 31st day of October, 1920, inclusive.

2. That during all of the time covered by this report he has continued in possession of and in

charge of the property of the Presidio Mining Company and has continued to operate the mining claims of said Company at Shafter, Presidio County, Texas. [233]

3. That during all of the time of his receivership he has to the best of his ability conducted and managed the said trust in good faith as economically as conditions would permit and for the best interests of the parties to said action, and as ordered by the Court.

4. That he has continued as his representative at the Mine and in charge of the operations thereof in Texas Mr. F. C. Handy, as manager, and has employed at the mine in charge of its various departments skilled men, experienced in the line of work of which each was respectively in charge.

5. That weekly and monthly reports of the operations of the mine have been sent to the Company's office in this city, and the same have been filed and kept open to the inspection of all of the parties to said action, and that all of the operations at said property and all of the business and proceedings of said receivership have been recorded in said office, and kept in such shape as to be open to inspection and information of all parties of said action.

6. That full accounts of the receipts and disbursements of the Receiver are kept at the office of the Company in the Balboa Building, this city, with vouchers for all expenditures, which are open to the inspection of the parties.

7. That during a large portion of the year, and commencing about August 14th, 1920, the weather in Shafter County and in the vicinity of the mine, and covering all of the district, which includes the wagon roads over which the supplies of the Company are conveyed, has been unusually bad, with heavy rains and high winds, to the extent that many times since that date the roads have been almost impassable for quite long periods, and the unbridged watercourses flooded to the extent that they could not be crossed, which delayed the work some as regards the moving of supplies. [234]

8. That the labor conditions at the mine have been unusual owing largely to the unsettled conditions in Mexico, and also owing to the fact that many of the laborers at the mine, who are Mexicans, have been prompted to seek other fields of labor owing to the larger wages paid, notwithstanding that your receiver felt obligated in the month of November last year to raise the wages of nearly all of the employees at the mine for the second time during his receivership. This raise was made necessary by the high cost of living. Also the cost of all supplies, including fuel oil, gasoline, coal oil, castings, hauling and freight charges, have been largely increased. However, notwithstanding all increases in cost of labor and supplies, the management has been able to keep the cost per ton of mining and milling the ore down to about the same figures as in 1919.

Financial Statement.

That there was on hand on October 31st, 1919, as a balance in cash on hand at the date of the last report, the sum of \$157,872.69, deposited in the following banks:

Mercantile National Bank, San Francisco	\$ 76,399.93
Bullion in Transit (subsequently cash)	50,898.71
Marfa National Bank (checking account)	13,986.40
Marfa National Bank (special account)	16,236.48
Anglo & London Paris National Bank	351.17

Total cash on hand \$157,872.69

There was also on hand at said time, invested in Liberty Loan Bonds, War Savings Stamps, and Treasury Certificates, the sum of \$275,889.48

[235]

That during the past year your Receiver has purchased the following securities:

1919.

Dec. 1—U. S. A. Certificates of Indebtedness, bearing $4\frac{1}{4}\%$ interest \$100,000.00

1920.

Feb. 4—U. S. A. Certificates of Indebtedness, bearing $4\frac{1}{2}\%$ interest 70,000.00

Feb. 17—U. S. A. Certificates of Indebtedness, bearing $4\frac{1}{2}\%$ interest 15,000.00

Accrued interest on above from Feb.

2 to Feb. 17 27.66

Apr. 1—U. S. A. Certificates of Indebtedness, bearing $4\frac{3}{4}\%$ interest	170,000.00
July 15—U. S. A. Certificates of Indebtedness, bearing $5\frac{3}{4}\%$ interest	220,000.00

Total \$575,027.66

Of the above securities the following were redeemed by the Government and the cash received by the Receiver:

1919.

Dec. 16—U. S. A. Certificates bought July 11, 1919, and bearing interest @ $4\frac{1}{2}\%$	\$ 45,055.48
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1920.

Mar. 15—U. S. A. Certificates of Indebtedness bought Feb. 4 and 17, 1920, and accrued interest on same	185,027.66
July 1—U. S. A. Certificates of Indebtedness bought Apr. 1, 1920	170,000.00

Total \$400,083.14

That the total amount of securities purchased between November 1, 1919, and October 31, 1920, was the sum of.. \$575,027.66

That the total amount redeemed during said period was the sum of 400,083.14

Leaving a balance of purchased securities over and above redeemed securities of \$174,944.52

Receipts from November 1st, 1919, to October 31st,
1920, Inclusive.

Bullion Receipts:

1919.

Nov. 30 \$56,032.99

Dec. 31 58,385.71

1920

Jan. 31 55,330.23

Feb. 28 51,219.20

Mch. 31 55,170.12

Apr. 30 50,735.96

May 31 44,806.17

June 30 40,319.37

July 31 40,404.56

Aug. 31 39,507.52

Sept. 30 39,555.34

Oct. 31 \$40,521.15 \$571,988.32

Scrap Iron and Other Ore Sales:

1920.

Jan. 31 2,765.74

Feb. 28 755.14 3,520.88

Miscellaneous Receipts at Mine:

1919.

Nov. 30 27.25

Dec. 31 65.20

1920.

Jan. 31 90.00

Feb. 28 3.00

Mar. 31 95.50

Apr. 30 57.05

May 31 68.25

June 30	26.00	
July 31	195.67	
Aug. 31	42.35	
Sept. 30	39.97	
Oct. 31	8.55	718.79

Interest on United States Securities and Bank Balances:

1919.

Nov. 30	692.87	
Dec. 31	3,126.37	

1920.

Jan. 31	114.65	
Feb. 28	1,151.45	
Mar. 31	2,355.34	
Apr. 30	1,562.73	
May 31	671.40	
June 30	2,040.30	
July 31	2,274.12	
Aug. 31	443.95	
Sept. 30	1,406.68	
Oct. 31	1,514.29	17,354.15

Amt. Carried Forward	\$593,582.14
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[237]

Amount brought forward	\$593,582.14
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U. S. A. Certificates:

1919.

Dec. 31	\$45,055.48	
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1920.

Mch. 31	185,027.66	
July 31	170,000.00	400,083.14

San Francisco Miscellaneous:

1919	
Mch. 31.....	100.00
	<hr/>
	\$993,765.28

TOTAL RECEIPTS.

1919	
Nov. 30	\$56,753.11
Dec. 31	106,632.76
1920	
Jan. 31	58,300.62
Feb. 28	53,128.79
Mar. 31	242,748.62
Apr. 30	52,355.74
May 31	45,545.82
June 30	42,385.67
July 31	212,874.35
Aug. 31	39,993.82
Sept. 30	41,001.99
Oct. 30	42,043.99
	<hr/>
	\$993,765.28

Disbursements from November 1st, 1919, to October 31st, 1920, Inclusive.

Statement of expense of operation paid at San Francisco at the office of the Presidio Mining Company, being the monthly expense of maintaining the office, clerk help, and including salary of the manager at Shafter:

1919	
Nov. 30	\$592.05
Dec. 31	635.55

1920

Jan. 31	.....	685.00	
Feb. 29	.....	621.95	
Mar. 31	.....	755.76	
Apr. 30	.....	618.15	
May 31	.....	623.15	
June 30	.....	618.10	
July 31	.....	709.85	
Aug. 31	.....	618.25	
Sept. 30	.....	626.95	
Oct. 31	.....	621.45	\$7,726.21

Amt. carried forward..... \$7,726.21

[238]

Amt. Brought forward\$7,726.21

Statement of Mine disbursements, including operating and supply costs at Shafter, Texas, excluding the salary and expenses of the manager:

1919

Nov. 30	.....	\$25,762.50
Dec. 31	.....	29,683.37

1920

Jan. 31	.....	29,124.91	
Feb. 29	.....	28,734.30	
Mar. 31	.....	27,151.69	
Apr. 30	.....	28,705.53	
May 31	.....	30,166.32	
June 30	.....	25,938.41	
July 31	.....	27,050.57	
Aug. 31	.....	25,999.14	
Sept. 30	.....	29,153.50	
Oct. 31	.....	26,155.82	333,626.06

Statement of fees and expenses of the Receiver
for the period October 31st, 1918, to October
31st, 1919, paid in January 1920, on order of
the Court:

1920

Jan. 31	\$10,000.00	
Mch. 31 premium on bond of Receiver	50.00	10,050.00
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Statement of Income Tax Payments:

1919

Dec. 31	\$26,043.89	
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1920

Mch. 31	16,754.58	
June 30	16,754.57	
Sept. 30	16,754.58	76,307.62
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Purchase of U. S. A. Certificates:

1919

Dec. 31	\$100,000.00	
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1920

Feb. 29	85,027.66	
Apr. 30	170,000.00	
July 31	220,000.00	575,027.66
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Statement of Costs of Auditor:

1919

Nov. 30	\$505.00	
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1920

Sept. 30	125.00	630.00
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Amt. carried forward\$1,003,367.55

Amt. brought forward			\$1,003,367.55
Statement of Accrued interest costs on purchase of Government securities:			
1920			
Jan. 31	.....	\$41.80	41.80
			<hr/>
			\$1,003,409.35

TOTAL DISBURSEMENTS.

1919			
Nov. 30	.....	\$26,859.55	
Dec. 31	.....	156,362.81	
1920			
Jan. 31	.....	39,851.71	
Feb. 29	.....	114,383.91	
Mch. 31	.....	44,712.03	
Apr. 30	.....	199,323.68	
May 31	.....	30,789.47	
June 30	.....	43,311.08	
July 31	.....	247,760.42	
Aug. 31	.....	26,617.39	
Sept. 30	.....	46,660.03	
Oct. 31	.....	26,777.27	
			<hr/>
			\$1,003,409.35

SUMMARY OF RECEIPTS AND DISBURSEMENTS.

Receipts.

Bullion Receipts	.....	\$571,988.32
S. F. Miscellaneous	.....	100.00
Scrap Iron and Ore Sales	..	3,520.88
Mine—Miscellaneous	.....	718.79

Interest Earned	17,354.15	
U. S. A. Certificates	400,083.14	\$993,765.28

Total funds on hand October 31st, 1919. 157,872.69

\$1,151,637.97

Disbursements.

Paid at San Francisco.....	\$ 7,726.21	
Mine Operating Expenses ..	333,626.06	
Receivership Fees, etc.	10,050.00	
Taxes, Income	76,307.62	
U. S. A. Certificates	575,027.66	
Auditing	630.00	
Bond Interest	41.80	1,003,409.35

Balance cash on hand 148,228.62

[240]

Deposited in Banks as follows:

Mercantile National Bank, S. F.....	\$79,308.82
Bullion in Transit (subsequently cash)	40,521.15
Marfa National Bank (checking ac- count)	11,155.06
Marfa National Bank (Special ac- count)	16,892.42
Anglo & London Paris Nat'l Bank....	351.17

\$148,228.62

Total securities on hand\$450,834.00

Total balance cash on hand148,228.62

Total cash and securities on hand \$599,062.62

IMPROVEMENTS.

During the year covered by this report the following principal improvements have been made at the works and mine:

At the mill to take place of the old oil storage tanks, which were rusted and practically useless and which were buried in the ground, there has been installed above the ground and so that the oil is transmitted to the mill by gravity two new tanks with 1000 bbl. capacity. These tanks are situated on concrete foundations and are so situated that one can be in use and the other empty for the purpose of cleaning the same, or both can be filled and used for storage in case it is necessary.

Total cost, tanks, foundation, piping, labor, etc.

..... \$3,264.89

At the pump plant, an auxiliary triplex pump of extra heavy construction, with counter shaft, pulleys, and an extension to the pump-house. This extra pump was necessary on account of the removal and abandonment of steam boilers, the auxiliary pump being a steam pump which was abandoned when the new de la Vergne engine was installed last year.

Total cost\$2,237.44

[241]

Two new wire cables were installed at the East Shaft Hoist, each 1000 feet long.

Total cost..... \$1000

On Engine D-204 a new governor and equipment

was added, to make the engine identical with the other two engines.

Total cost..... \$600

At the tool sharpening forge, an additional oil storage tank was installed, doubling the storage capacity.

No separate cost kept.

At the East Shaft two oil storage tanks, with piping and burner were installed to fire the steam boiler, should it be necessary at any time to run the hoist with steam. This boiler had heretofore been run with wood, but on account of the scarcity of wood the change was necessary.

Cost appears in operating expenses.

A small lighting plant was installed at the mine for the purpose of lighting the Mina Grande Tunnel, South Shaft Hoist, and the Mine offices and cottages. These places are situated a long distance from the mill and it was deemed cheaper and safer to light with electricity.

Total cost, including storage batteries....\$650.00.

Most of the buildings at the works have been painted during the past year, including roof and woodwork of mill buildings, machine-shop, store-room, etc., and also at the mine the roofs of the power-house and all woodwork, shops, South Shaft Hoist, forge, mine office buildings, etc. Also considerable work in the way of repairs of the adobe houses occupied by the Mexicans and located on the Company lands, [242] damaged by the storms during this fall, has been done.

INCREASED WAGES OF WORKMEN.

In the month of November the situation at the Mine became critical on account of the loss of workmen and discontent with the then going wages. The result was such that it jeopardized the running of the plant, whereupon your Receiver, with the consent of the parties to the action, authorized another raise in wages similar to the raise reported at the first report. This raise applied only to the labor subordinate to the manager, the manager's wages not being raised, and while it varies from month to month owing to the number of men employed, it averaged during the year somewhere between \$1200 and \$1700 per month.

Your Receiver further reports that the fees of himself and attorney have been paid to the 31st day of December, 1919; that neither have received any fees whatever for the year 1920. That the latest Act of Congress passed as a war measure with reference to Income Tax on corporations is still in force, but it is rumored that the same may be reduced for the next year. Hence it is proper that in making out the Income Tax statement covering this year's income that all of the costs of the receivership of this year should be paid so as to make the same a deduction on the Income Tax statement for the fiscal year 1920, and it is therefore advisable that the Court fix the fees of the Receiver for himself and his attorney for the year 1920, it being the habit to have a proportionate share of the fees for each fiscal year paid during that year.

WHEREFORE your Receiver prays that said report and account be approved, and that the fees of himself and his [243] attorney be fixed by the Court and ordered paid from the funds on hand.

Respectfully submitted,

WALTER B. MALING,

Receiver.

FRANK. R. WEHE,

Attorney.

[Endorsed]: Filed Nov. 30, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [244]

(Title of Court and Cause.)

In the District Court of the United States, for the Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,

Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Objections of Defendants to the Allowance of and to Settlement of Receiver's Account.

Walter B. Maling, Receiver herein, having filed in said Court first above mentioned his report and account of his proceedings as such Receiver from the 1st day of November, 1919, to the 31st day of October, 1920, inclusive, and also having therein asked said Court for an allowance to himself and his attorney, Frank R. Wehe, Esq., on account of their services as such Receiver and attorney herein, covering the calendar year one thousand nine hundred and twenty, in order that the expenses of the receivership may be treated as deductions from the net income of said receivership during said fiscal year;

Now comes the defendants in the above-entitled cause, and object to the settlement of said account, and hereby reserve to themselves the right at all future times, to object to any and all of the actions and proceedings of said Receiver, and to insist in all proper places and at all proper times upon their said objections, and upon objections heretofore made, to the appointment of said, or any, Receiver, and/or upon any proceedings based upon said, or similar, objections that said defendants, [245] or any of them, heretofore have made, or may hereafter be submitted:

Said defendants concede that if said receivership is proper, and said Receiver was legally and properly appointed, that then the sum of Ten Thou-

sand (10,000) Dollars is a reasonable sum to be allowed to said Receiver (Five Thousand (5,000) Dollars for himself and Five Thousand (5,000) Dollars for his attorney), covering the full fiscal year of One Thousand Nine Hundred and Twenty;

As to the allowance of said account, and as to the allowance to said Receiver and his said attorney, these defendants further state that said defendants claim that in the event the order appointing said Receiver is reversed by the United States Circuit Court of Appeals, that then said Receiver must redeliver the property of the defendant, Presidio Mining Company, to it without deduction;

And the defendants now make the further specific objection to said account, that the sum of Fourteen Hundred and Seventy-five (1475) Dollars paid to Florence M. Handy, the bookkeeper of said Receiver, and the sum of Five Thousand Four Hundred (5400) Dollars paid to F. C. Handy, the representative of the Receiver at the mine, are erroneously included in the statement of expenses of operation, on page six (6) of said report, but that they are in fact expenses of the receivership, and would not have been incurred or paid, except for the said receivership.

Dated this 4th day of December, One Thousand Nine Hundred and Twenty (1920).

R. T. HARDING and
HENRY E. MUNROE,

Attorneys and Solicitors for said Defendants.

[Endorsed]: Filed Dec. 4, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [246]

(Title of Court and Cause.)

Order Confirming Third Report and Account of Receiver and Allowing Compensation to said Receiver and His Attorney.

Walter B. Maling, Receiver herein, having heretofore presented his third report and account of his receivership covering the period from the end of his second account, October 31st, 1919, to and including the 31st day of October, 1920, and also having applied therein for compensation for himself and his attorney, Frank R. Wehe, for the calendar year 1920; and the matter duly coming on to be heard on this day on the objections to said account made by defendants herein, and all of said parties being present at said hearing represented by their counsel, and said objections having been fully considered by the Court; and it appearing to the Court that said accounts are correct and that said Receiver has fully obeyed all of the orders of the Court to him issued, has fully accounted for all of his receipts and disbursements during said period covered by said account, and that the sum of Five Thousand (5000) Dollars is a reasonable sum to be allowed said Receiver for compensation during the period from the 31st of December, one thousand nine hundred and nineteen (1919), to and including the 31st day of December, one thousand nine hundred and twenty (1920), and a like sum of Five Thousand (5000) Dollars is a reasonable fee to be allowed the said attorney of said Receiver for the said period;

IT IS NOW THEREFORE ORDERED that all acts and things done by said Receiver, as well as his said accounts herein, be and they are hereby approved and confirmed, and that he be [247] allowed as compensation for himself the said sum of Five Thousand (5000) Dollars, and that the said attorney for the said Receiver be allowed as his fee as attorney for said Receiver a like sum of Five Thousand (5000) Dollars, both to be in full for all services rendered in this matter by said Receiver and his said attorney during said period of one (1) year, and that said Receiver be and he is hereby authorized to pay both of said sums from the funds of said trust now in his hands.

Done in open court this 4th day of December, one thousand nine hundred and twenty (1920).

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Dec. 4, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [248]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Fourth and Final Report and Account of Receiver.

Walter B. Maling, Receiver herein, presents this his Fourth and Final Report and Account of his receivership:

(1) That he filed his first report and account herein on the 2d day of November, 1918, and on the 28th day of December, 1918, he filed a supplemental report thereto. That said reports contained a financial statement and report of his receivership from the 23d day of February, 1918, the date he took possession of the office of said Presidio Mining Company, to the 31st day of October, 1918. That said report and account and the supplement thereto were duly allowed and confirmed by order of this Court filed in this Court on the 13th day of January, 1919. That on the 10th day of December, 1919, he filed his second report and account herein

for the period covering the time from the 1st day of November, 1918, to the 31st day of October, 1919, both inclusive, and said report and account was duly allowed and confirmed by order of this Court filed herein on January 13th, [249] 1920. That on the 30th day of November, 1920, he filed his third report and account herein for the period covering, the time from the 1st day of November, 1919, to the 31st day of October, 1920, inclusive, and that on the 4th day of December, 1920, said report and account was duly allowed and confirmed by this Court by order filed in this Court on said 4th day of December, 1920.

(2) That on the 6th day of May, one thousand nine hundred and twenty-one (1921), this Court, by order duly entered herein on the same day and directed to your Receiver, ordered that he turn over and deliver to the defendant Presidio Mining Company all of the property of said defendant in his possession or under his control, as such Receiver, except the sum of Five Thousand (5000) Dollars, which was to be retained by him in order to satisfy any balance of commissions and expenses of the Receivership, including attorney fees, which may be allowed him in his final account; that he take from said defendant Presidio Mining Company such receipts and acknowledgments as would evidence the payment and delivery of said property; and that he file herein a report and account of his receivership since his last report and account and present the same to this Court; and also that the Clerk of this Court certify to a copy thereof and cause the same

to be filed with the Clerk of the District Court of the United States for the Western District of Texas, at El Paso, in the Auxiliary Suit of Overton et al. vs. Presidio Mining Company, et al., No. 114 Equity.

(3) That in obedience to the said order of this Court, he immediately caused to be forwarded to the Clerk of the said Court last mentioned a certified copy of the order of this Court last above mentioned, and that on the 10th day of May, one thousand nine hundred and twenty-one (1921), the [250] said District Court of the United States, for the Western District of Texas, at El Paso, in said Auxiliary Suit No. 114 Equity, duly entered its order requiring this Receiver to deliver to said defendant Company all property of said defendant company in his possession or under his control as such Receiver, a certified copy of which order is filed herewith and a true copy thereof annexed hereto and marked Exhibit "A."

(4) That in obedience to said orders your Receiver has performed the following acts:

(a) That on the 6th day of May, one thousand nine hundred and twenty-one (1921), he duly delivered to said defendant Presidio Mining Company all of the property of said Company in his hands in the State of California, except the said sum of Five Thousand (5000) Dollars, which was retained by him for the purposes mentioned in said order, which said property so delivered was as follows:

Check on the Anglo & London, Paris
National Bank of San Francisco, for. \$351.17

Check on the Mercantile Trust Com-
pany of San Francisco, for..... 66,115.33

Liberty Loan Bonds described as follows:

Second $4\frac{1}{4}\%$ Bonds (converted) with
coupons #6 and up, 25 bonds @
\$1,000 each numbered as follows:..
116,483; 116,484; 116,485; 116,486;
990,853; 1196,353; 752,427; 752,428;
752,429; 752,432; 752,433; 752,434;
85,845; 990,477; 1,128,655; 1,128,-
656; 1,128,657; 1,128,658; 1,128,659;
1,121,952, 990,566; 990,567; 990,585;
916,019; 916,020 25,000.00

Third $4\frac{1}{4}\%$ Bonds (converted) with
coupons #7 and up, 6 bonds @
\$10,000 each numbered as follows
28,529; 28,530; 26,649; 26,650;
27,284; 27,28560,000.00
[251]

Fourth $4\frac{1}{4}\%$ Bonds, with coupons #6
and up, 7 bonds described as follows:
78,628—1 bond5,000.00
109,210; 109,211; 109,212;
109,213; 109,214; 109,215;
6 bonds @ \$10,000 each 60,000.00 65,000.00

320 *Presidio Mining Company et al. vs.*

Victory 4¾% bonds, with coupons #4
and up, 80 bonds @ \$1,000 each num-
bered as follows:

1,149,001 to 1,149,080 (inclusive) .. 80,000.00

U. S. A. Certificates of Indebtedness,
Series F-1921, @ 5¾% p. a., dated
Jan. 15, 1921, maturing Oct. 15, 1921,
and numbered as follows:

280 to 293 (inclusive),

14 certificates @ \$5000

each 70,000.00

17 and 18, 2 certificates

@ 100,000 each 200,000.00

270,000.00

U. S. A. Certificates of Indebtedness,
Series G-1921 @ 5½% p. a., dated
Feb. 15, 1921, maturing July 15, 1921,
numbered as follows:

6 5,000.00

19 and 20, 2 certfs. @

\$10,000. each, 20,000.00 25,000.00

200 War Savings Stamps of the face
value of 1,000.00

Order upon American Smelters Securities Company
of San Francisco, California, to make remittance
to the Presidio Mining Company for Bars num-
bered 10,325 to 10,334, inclusive, containing ap-
proximately 13,292.22 Fine Ounces of Silver bul-
lion.

(b) That he took therefor the receipt of said Presidio Mining Company, the original of which is filed herewith, and a true copy thereof annexed hereto and marked Exhibit "B."

(c) That under the authorization contained in said order upon the American Smelters Securities Company of San Francisco to make remittances to the Presidio Mining Company for bars numbered 10,325 to 10,334, inclusive, and for other shipments of Ore up to the 9th day of May, One thousand nine hundred and twenty-one (1921), said Securities Company has paid to said Presidio Mining Company sums of money as follows: [252]

For bars numbered 10,325 to 10,334, inclusive, check in the sum of Twelve Thousand Seven Hundred and Forty-nine and 67/100 (12,749.67) Dollars to the order of the Presidio Mining Company on May 17th, 1921; and for bars numbered 10,335 to 10,342, inclusive, checking the sum of Eleven Thousand Three Hundred and Ninety-two and 77/100 (11,392.77) Dollars, to the order of the Presidio Mining Company on May 24th, 1921, for which said Presidio Mining Company has receipted to your Receiver, the original receipt for which is filed herewith, and a true copy thereof is annexed hereto and marked exhibit "C."

(d) That on the 11th day of May, one thousand nine hundred and twenty-one (1921), Fred C. Handy, the representative of your Receiver at Shafter, Texas, under instructions from your Receiver and in obedience to said order of said Texas Court, said exhibit "A" delivered to said Presidio

Mining Company all of the property of said defendant Presidio Mining Company situated in the state of Texas, and then in the possession of your Receiver, taking therefor a receipt for the same, and that said defendant Presidio Mining Company at the same time assumed the payment of all supplies theretofore ordered by your Receiver for the operation of said property and not then paid for, and also assumed the payment of all unpaid labor, and filed herewith is the original of said receipts and authorizations, marked, respectively, Exhibits "D" and "E."

(e) That among the property delivered by your Receiver to said Presidio Mining Company was cash as follows:

Cash balance in Marfa National Bank . \$4,242.66

Cash in Savings Account, Marfa National Bank 17,230.27

With accrued interest from February 1st, 1921, to May 1st, 1921.

[253] Money in office safe at Shafter, as follows:

Coin	\$360.12	
Paid C. O. D. package	1.29	
Paid for postage stamps ...	10.00	\$371.41

That at said time there were also outstanding checks numbers 02668 to 02710, inclusive, the above mentioned checks being as follows:

Al Driffill	\$30.40
E. H. Page	17.60
T. H. Pomeroy	30.50

F. C. Handy	30.50	
H. Bryant	30.50	
E. G. Gleim Co.	3.00	\$142.55

That the receipt therefor is filed herewith and a true copy annexed hereto marked exhibit "F."

That a full inventory of the other property delivered by your Receiver to said defendant Presidio Mining Company is contained in an exhibit mentioned in said receipt exhibit "D" as exhibit "A," the original of which is filed herewith, and a true copy of which is annexed to this report and marked exhibit "G."

(5) That further in obedience to said order of this Court your Receiver herewith reports and accounts as follows:

(6) That during all of the time covered hereby and until the delivery of the possession of said property to said defendant Presidio Mining Company, as aforesaid, he has continued in possession of and in charge of the property of the said defendant Presidio Mining Company and operated the mining claims of said Company at Shafter, Presidio County, Texas.

(7) That during all of the time of his receivership he has to the best of his ability conducted and managed the said trust in good faith as economically as conditions would permit and for the best interests of the parties to said [254] action, and as ordered by the Court.

(8) That he has continued as his representative at the mine and in charge of the operations thereof in Texas Mr. F. C. Handy, as manager, and has em-

ployed at the mine in charge of its various departments skilled men, experienced in the line of work of which each was respectively in charge.

(9) That weekly and monthly reports of the operations at the mine have been sent to the Company's office in this city, and the same have been filed and kept open to the inspection of all the parties of said action, and that all of the operations at said property and all of the business and proceedings of said receivership have been recorded in said office, and kept in such shape as to be open to the inspection and information of all the parties to said action.

(10) That full accounts of the receipts and disbursements of the Receiver are kept at the office of the Company in the Balboa Building, this city, with vouchers for all expenditures, which are open to the inspection of the parties.

(11) That on the 3d day of February, one thousand nine hundred and twenty-one (1921), all of the parties to said action stipulated that your Receiver could donate from the funds of said receivership in his hands the sum of one hundred (100) Dollars to C. C. Broadwater, representing the Committee to Receive Donations from Mining Companies to be paid to the Pacific Branch, European Relief Council for Starving Children of Europe, and thereupon your Receiver paid from the funds of said receivership the said sum of One Hundred (100) Dollars.

(12) That in the month of December, one thousand nine hundred and twenty (1920), by stipulation of all the parties, and upon order of this Court

for the sale thereof, your Receiver [255] duly sold a number of securities in his hands as such Receiver, and that thereafter and during the same month, by stipulation and order of all of the parties to said action, he invested the said funds in other securities, which said securities are accounted for in this account.

(13) That on the 11th day of May, one thousand nine hundred and twenty-one (1921), when the mining property, works, etc., at Shafter were turned over to the defendant Presidio Mining Company, said property was in good order and the mine and reduction works in full operation; that large quantities of milling ore were broken down in the mine, with chutes and ore bins filled, so that said defendant Presidio Mining Company could continue the operations of mining and milling said ore and operating said property without the loss of time or depreciation of the output, all in accordance with good mining methods.

(14) That your Receiver further reports that during the whole time of said receivership the said parties plaintiff and the said defendant Presidio Mining Company, by its principal officers, and the attorneys on both sides have been uniformly courteous, and that all of said parties just mentioned have assisted your Receiver in the performance of his duties, to the end that the successful management of your Receiver of the properties of said defendant Presidio Mining Company is in part due to the said assistance received from said parties. [256]

FINANCIAL STATEMENT.

That there was on hand on October 31st, 1920, as a balance of cash at the date of the last report the sum of \$148,228.62 deposited in the following banks:

Mercantile Trust Co. of S.F. \$79,308.82

Bullion in transit (subsequently cash) 40,521.15

Marfa National Bank (checking account) 11,155.06

Marfa National Bank (special account) 16,892.42

Anglo & London Paris National Bank 351.17

That there was also on hand at said time, invested in Liberty Loan Bonds, War Savings Stamps, and Treasury Certificates, in face value, the sum of. 450,834.00

Total \$599,062.62

RECEIPTS FROM NOVEMBER 1ST, 1920,
TO MAY 6TH, 1921.

Bullion Receipts:

1920.

Nov. 30 \$36,082.93

Dec. 31 41,873.49

1921.

Jan. 31 38,945.19

Feb. 28 39,773.39

Mar. 31 38,611.90

Apr. 30 38,890.64

May 6 11,392.77 \$245,570.31

Miscellaneous Receipts at San Francisco:

1920.

Nov. 30	\$3.50	3.50
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Miscellaneous Receipts at Mine:

1920.

Nov. 30	\$57.45	
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Dec. 31	56.25	
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1921.

Jan. 31	70.80	
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Feb. 28	107.00	
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Mar. 31	906.82	
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Apr. 30	11.10	1,209.42
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[257]

Amt. carried forward	\$246,783.23
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Amt. brought forward	\$246,783.23
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Interest on United States Securities
and Bank Balances:

1920.

Nov. 30	\$682.65
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Dec. 31	3,259.53
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1921.

Jan. 31	6,445.88
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Feb. 28	411.87
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Mar. 31	1,342.29
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Apr. 30	1,466.96	13,609.18
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U. S. A. Certificates of Indebtedness:

328 *Presidio Mining Company et al. vs.*

1921.

Jan. 31 \$220,000.00 220,000.00

Sale of Liberty Loan Bonds:

1920.

Dec. 31 \$205,786.00 205,786.00

\$686,178.41

TOTAL RECEIPTS BY MONTHS.

1920.

Nov. 30 \$36,826.53

Dec. 31 250,975.27

1921.

Jan. 31 265,461.87

Feb. 28 40,292.26

Mar. 31 40,861.01

Apr. 30 40,368.70

May 6 11,392.77

Total\$686,178.41

DISBURSEMENTS FROM NOVEMBER 1ST,
1920, TO MAY 11TH, 1921.

Statement of expense paid at San Francisco at the office of the Presidio Mining Company, being the monthly expense of maintaining the office, clerk help, and including the salary of the manager at Shafter up to April 25, 1921:

1920.

Nov. 30 \$621.05

Dec. 31 969.02

1921.

Jan. 31 698.75

Feb. 28 724.35

Mar. 31	667.40	
Apr. 30	627.60	
May 11	44.25	\$4,352.42

	<hr/>	<hr/>
Amt. carried forward		\$4,352.42

[258]

Amt. Brought Forward	\$4,352.42
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Statement of Mine Disbursements,
including Operating and Supply Costs
at Shafter, Texas, excluding salary and
expenses of the manager:

1920.

Nov. 30	\$25,284.44
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Dec. 31	30,314.26
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1921.

Jan. 31	32,012.30
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Feb. 28	29,332.42
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Mar. 31	28,182.37
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Apr. 30	30,167.76
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May 11	2,456.96	177,750.51
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Statement of Income Tax

Payments:

1920.

Dec. 31	\$16,754.57
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1921.

Mar. 31	5,643.82	22,398.39
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Purchase of Liberty and
Victory Bonds:

1920.

Dec. 31	\$206,108.56	206,108.56
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Purchase of United States Certificates of Indebtedness:

1921.

Jan. 31	\$270,000.00	
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Feb. 28	25,000.00	295,000.00
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Accrued Interest Paid on Purchase of United States Securities:

(a) Liberty and Victory Bonds:

1920.

Dec. 31	\$1186.44	
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(b) United States of America

Certificates of Indebtedness:

1921.

Feb. 28	7.53	1,193.97
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Auditing Costs on Preparation of U. S. Income Tax statement for the year 1920:

1921.

Mar. 31	\$100.00	100.00
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Amt. carried forward		\$706,903.85
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[259]

Amt. brought forward		\$706,903.85
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Statement of Fees and Expenses of Receiver for the Period of Jan. 1st to Dec. 31st, 1920:

1920.		
Dec. 31	\$10,000.00	
1921.		
Apr. 30	50.00	10,050.00
	<hr/>	<hr/>
Total		\$716,953.85

TOTAL DISBURSEMENTS BY MONTH.

1920.	
Nov. 30	\$ 25,905.49
Dec. 31	265,332.85
1921.	
Jan. 31	302,711.05
Feb. 28	55,064.30
Mar. 31	34,593.59
Apr. 30.....	30,845.36
May 11	2,051.21
	<hr/>
Total	\$716,953.85

SUMMARY OF RECEIPTS AND DISBURSEMENTS.

Receipts.

Cash on hand October 31st, 1920 \$148,228.62

Receipts this account:

Bullion	\$245,570.31	
San Francisco Miscella- neous	3.50	
Mine Miscellaneous	1,209.42	
Interest Earnings	13,609.18	
U. S. A. Certificates of Indebtedness	220,000.00	
Liberty Loan Bonds Sold	205,786.00	\$686,178.41
	<hr/>	<hr/>
Total		\$834,407.03

(NOTE.—The above sum of total receipts for this account represents bullion in transit and not cash up to May 6th, 1921, and receipted for in Exhibits B and C, in the sum of \$24,142.44.)

Amount carried forward	\$834,407.03
[260]	
Amt. brought forward	\$834,407.03
Disbursements.	
Paid at San Francisco .. \$	4,352.42
Mine Operating Expenses	177,750.51
Taxes—Income	22,398.39
Liberty Loan Bonds	206,108.56
U S. A. Certfs. of Indebtedness	295,000.00
Bond Interest	1,193.97
Auditing	100.00
Receivership Fees	10,050.00
Total	716,953.85
Balance	\$117,453.18
Less bullion mentioned in above note to receipts	24,142.44
Net Balance	\$ 93,310.74
The above balance is represented by cash on hand as follows:	
In Mercantile Trust Co. of San Francisco	\$71,115.33

In Anglo & London Paris	
National Bank	351.17
In Marfa National Bank,	
Special Account	17,230.27
In Marfa National Bank	
Checking Account	4,100.01
Cash in safe at Shafter	371.41
Checks paid out of funds	
in safe	142.55
Total Securities on hand,	
face value	\$526,000.00
	<hr/>
	\$619,310.74

(NOTE.—A full description of the securities is found on pages 3 and 4 of this report and in Exhibit “B.”) [261]

Total securities on hand and cash balance carried over	\$619,310.74
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SUMMARY OF FUNDS AND SECURITIES DELIVERED TO PRESIDIO MINING COMPANY, NOT INCLUDING BULLION IN TRANSIT IN AMOUNT OF \$24,142.44, RECEIPTED FOR IN EXHIBITS “B” AND “C.”

Cash in Anglo & London	
Paris National Bank .. \$	351.17
Cash in Mercantile Trust	
Co. of S. F.	66,115.33
Face Amount of United	
States Securities	526,000.00

Cash in Marfa National		
Bank	17,230.27	
Cash in Marfa National		
Bank (Checking Acct.)	4,100.01	
Cash in safe at Shafter ..	371.41	
Checks paid out of funds		
in safe	142.55	
		<hr/>
		614,310.74
		<hr/>
Balance		\$ 5,000.00

That out of said balance on hand of \$5000 your Receiver has expended in expenses of the receivership since May 6th inst., the following sums:

1921.

May 24—To Fred C. Handy,		
salary from Apr. 25 to May		
11	\$300.00	
May 24—Traveling expenses		
of said Handy from Marfa		
to San Francisco	100.00	
May 26—Bookkeeper, salary		
for May	125.00	525.00
	<hr/>	<hr/>
Balance on hand		\$ 4,475.00

(NOTE.—That there is a small balance of interest due from the Mercantile Trust Company, the exact amount of which your Receiver is not now informed, but which will probably amount to the sum of about \$25.)

Your Receiver further reports that the fees of himself and attorney have been paid to the 31st day of December, 1920; that neither have received any fees whatever for the present year.

WHEREFORE your Receiver prays that said report and account be approved and that the fees of himself and his attorney since the 31st day of December, 1920, as such [262] Receiver, and for closing the affairs of said trust as appears by this report be fixed by the Court and ordered paid from the balance of said funds now in his hands.

Respectfully,

WALTER B. MALING,

Receiver.

FRANK R. WEHE,

Attorney. [263]

State of California,

City and County of San Francisco,—ss.

Walter B. Maling, said Receiver, being first duly sworn, deposes and says:

That he has read the foregoing report and account and that the same is true.

WALTER B. MALING.

Subscribed and sworn to before me this 27th day of May, 1921.

[Seal]

RITA JOHNSON,

Notary Public in and for the City and County of San Francisco, State of California. [264]

Exhibit "A."

In the District Court of the United States, for the
Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

**Auxiliary Order for Receiver to Deliver Property
to Defendant, Presidio Mining Company.**

The Southern Division of the United States District Court for the Northern District of California, Second Division, in the Primary Action of W. S. Overton, et al., vs. Presidio Mining Co., a corp. et al., No. 196—Equity, having entered an order requiring Walter B. Maling, the Receiver therein and herein to deliver to said defendant company all property of said defendant company in his possession or under his control as such receiver, a part of which property is situated in this district, it is hereby likewise ordered that all property of said defendant in this district now in the possession of, or under the control of, said Receiver be forthwith

delivered to said defendant Presidio Mining Company.

Dated this 10th day of May, 1921.

(Signed) W. R. SMITH,
Judge.

[Endorsed]: Filed May 10, 1921. D. H. Hart,
Clerk. By J. N. Phillips, Deputy. [265]

United States of America,
Western District of Texas,—ss.

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing is a true and correct copy of the original auxiliary order for receiver to deliver property to defendant Presidio Mining Company, in cause No. 114—Equity, entitled *W. S. Overton et al. vs. Presidio Mining Co., a corp., et al.*, as the same appears on file and of record in this office.

Witness my official signature and the seal of said court affixed at office in the city of El Paso, Texas, this 10th day of May, A. D. 1921.

[Seal]

D. H. HART,
Clerk.

By J. N. Phillips,
Deputy. [266]

Exhibit "B."

In the District Court of the United States in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, et als.,
Defendants.

San Francisco, California, May 6th, 1921.

Received from Walter B. Maling, Receiver of the
Presidio Mining Company, the following property:
Check on the Anglo & London, Paris

National Bank of San Francisco, for..\$ 351.17

Check on the Mercantile Trust Company
of San Francisco, for..... 66,115.33

Liberty Loan Bonds described as fol-
lows: Second 4¼% Bonds (con-
verted) with coupons #6 and up, 25
bonds @ \$1,000 each numbered as
follows:

116483; 116484; 116485; 116486;	
990853; 1196353; 752427; 752428;	
752429; 752432; 752433; 752434;	
85845; 990477; 1128655; 1128656;	
1128657; 1128658; 1128659; 1121952;	
990566; 990567; 990585; 916019;	
916020	25,000.00

Third $4\frac{1}{4}\%$ Bonds (converted) with coupons #7 and up, 6 bonds @ \$10,000 each numbered as follows:

28529; 28530; 26649; 26650; 27284;	
27285	60,000.00

[267]

Fourth $4\frac{1}{4}\%$ Bonds, with coupons #6 and up, 7 bonds described as follows:

78,628—1 bond	5,000.00
109,210; 109,211; 109,212;	
109,213; 109,214; 109,215;	
6 bonds @ \$10,000 each...	60,000.00 65,000.00

Victory $4\frac{3}{4}$ bonds, with coupons #4 and up, 80 bonds @ \$1,000 each, numbered as follows:

1,149,001 to 1,149,080 (inclusive)....	80,000.00
----------------------------------------	-----------

U. S. A. Certificates of Indebtedness, Series F-1921 @ $5\frac{3}{4}\%$ p. a., dated Jan. 15, 1921, maturing Oct. 15, 1921, and numbered as follows:

280 to 293 (inclusive)	
14 certificates @ \$5,000	
each	70,000.00
17 and 18, 2 certificates	
@ 100,000 each.....	200,000.00 270,000.00

U. S. A. Certificates of Indebtedness, Series G-1921, @ $5\frac{1}{2}\%$ p. a., dated Feb. 15, 1921, maturing Jul. 15, 1921, numbered as follows:

6,	5,000.00
19 and 20, 2 certfs.	
@ \$10,000 ea	20,000.00
	<hr/>
	25,000.00

200 War Savings Stamps of the face
value of 1,000.00

Order upon American Smelters Securities Company
of San Francisco, California, to make remittance
to the Presidio Mining Company for Bars num-
bered 10,325 to 10,334, inclusive, containing ap-
proximately 13,292.22 Fine Ounces of silver
bullion.

PRESIDIO MINING COMPANY.

By B. S. NOYES,
President.

By L. M. DOHERTY,
Secretary. [268]

Exhibit "C."

In the District Court of the United States in and
for the Northern District of California, Second
Division.

No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY et al.,
Defendants.

San Francisco, California, May 17, 1921.

Received from Walter B. Maling, Receiver of the Presidio Mining Company, order upon American Smelters Securities Company of San Francisco, California, to make remittance to the Presidio Mining Company for bars numbered 10,335 to 10,342, inclusive, containing approximately 11,928.76 fine ounces of silver bullion.

PRESIDIO MINING COMPANY.

By B. S. NOYES,

President.

By L. M. DOHERTY,

Secretary. [269]

Exhibit "D."

I, the undersigned, duly authorized representative of the Presidio Mining Company, at Shafter, in the State of Texas, hereby acknowledge due receipt from Walter B. Maling, Receiver in the action of Overton et al. vs. Presidio Mining Company, et al., now pending in the Southern Division of the United States District Court, for the Northern District of California, Second Division, No. 196—Equity, and the same entitled action now pending in the District Court of the United States for the Western District of Texas, at El Paso, No. 114—Equity, of all of the property in Texas now in possession of said Receiver and fully described in the annexed Inventory marked exhibit "A," and it is hereby understood that as to all supplies mentioned in said Inventory heretofore ordered by said Receiver, by his representative, Fred C.

Handy, and not yet paid for, that said Presidio Mining Company will assume the payment of the same in due course.

Dated: May 11th, 1921.

E. M. GLEIM,

Representative, Presidio Mining Company.

Mr. E. M. Gleim:

Upon the delivery to you of the property of the Presidio Mining Company in Texas by Mr. Fred C. Handy, representative of the Receiver, you are hereby authorized to execute a receipt therefor substantially in the foregoing form.

PRESIDIO MINING COMPANY.

By B. S. NOYES,

President.

L. M. DOHERTY,

Secretary. [270]

Exhibit "E."

Shafter, Texas, May 11th, 1921.

As a part of the foregoing receipt and in conformity with joint telegram signed by Walter B. Maling and B. S. Noyes, the Presidio Mining Company assumes payment of bills owing by Receiver for unpaid supplies and labor, to be paid by it in due course.

E. M. GLEIM,

Representative Presidio Mining Company. [271]

Exhibit "F."

Shafter, Texas, May 11th, 1921.

I, the undersigned, the duly authorized representative of the Presidio Mining Company, at Shafter,

in the State of Texas, hereby acknowledge due receipt from Walter B. Maling, Receiver in the action of Overton et al. vs. Presidio Mining Company, et al. of the following moneys and bank deposits, to wit:

Cash balance in Marfa National Bank, Marfa, Texas, as shown by check-book stubs in Shafter office, after checks No. 02668-02710 inclusive have been paid and including checks as listed below \$4242.56

The above-mentioned checks being as follows:

Al Driffill	\$30.40	
E. H. Page.....	17.65	
T. H. Pomeroy.....	30.50	
F. C. Handy.....	30.50	
H. Bryant	30.50	
E. G. Gleim Co.....	3.00	142.55

Money in office safe at Shafter, as follows:

Coin	\$360.12	
Paid C. O. D. package, H. Cook Co...	1.29	
Paid for Postage Stamps.....	10.00	371.41

Cash in savings account Marfa National Bank, Marfa, Texas, on February 1st, 1921, with accrued interest from February 1st. 1921, to May 1st, 1921 \$17,230.27

E. M. GLEIM,

Representative Presidio Mining Company. [272]

Exhibit "G."

Exhibit "A."

PRESIDIO MINING COMPANY.

Inventory of real estate, buildings, equipment, machinery, etc., belonging to Presidio Mining Company, turned over this 11th day of May, 1921, to E. M. Gleim, representative, Presidio Mining Company by Walter B. Maling, Receiver, per F. C. Handy, his representative.

Real Estate

Section 8, Containing 640 acres.

Section 5, Containing 640 acres.

Tailings Dump, " 26.41 "

Tramway line, " 37.00 "

Mill Site, " 73.87 "

Buildings.

1 Mill Building, galvd. iron sides, metal roof containing the following machinery and equipment:

1 tramway terminal, with weight boxes.

1 steel ore bin & shaking screens, 550 ton capacity.

1 wooden water tank, 10,000 gallons capacity.

2 condensers.

1 steel hot-water tank.

15 stamp battery complete, 1150# stamps.

1 steel battery storage tank, 14' x 8'.

2 Dorr thickeners complete, 30' x 10' with motors.

1 Ingersoll-Rand air-compressor, 12 $\frac{1}{4}$ x12.

1 Marsh air-compressor, 10 x 12.

- 2 circulating pumps, $2\frac{1}{2} \times 3$, with motors.
- 1 Allen cone classifier.
- 1 Worthington D. C. fire pump, $9 \times 4 \times 10$.
- 1 Ingersoll-Rand air-compressor & rec. 10×10 .
- 1 Westinghouse electric generator, 37 K. W.
115 V.
- 1 G. E. generator, 20 K. W. 115 V.
- 1 De La Vergne oil burning engine, 100 h. p.
- 2 De La Vergne oil burning engines, 150 h. p.
each.
- 2 bucket elevators, 55 ft. lift.
- 2 steel tube mills, each $4'-6'' \times 18'$.
- 2 Oliver continuous filters, each $11'-6'' \times 14'$.
- 1 steel tank for sulphate.
- 1 steel sump-tank, $18' \times 5'$.
- 4 steel Pachuca agitating tanks, $14' \times 28'$.
- 2 steel clarifying tanks, each $16' \times 4'$.
- 1—6 comp. metal zinc boxes, with motor.
- 3—double 5 comp. metal zinc boxes.
- 5—8 comp. wooden zinc boxes.
- 1—Donaldson melting furnace, with motor &
blower.
- 1 reverbatory simplex melting furnace.
- 2 Deming triplex pumps, $4'' \times 6''$.
- 1 steel oil storage tank, 17 bbl. for melting room.
- 1 steel oil storage tank, 17 bbl. for engine room.

[273]

- 1 steel clean up tank, $4' \times 5'$.
- 6 steel fuel oil storage tanks, below ground,
109 bbls. capacity each.
- 2 steel fuel oil storage tanks, above ground,
1000 bbls. capacity.

With all pipe-lines, electric lines, line shafts, counter shafts, clutches, pulleys, belting, etc.

- 1 office building, 3 rooms, with furniture, records, etc.
- 1 Supt's residence, 5 rooms with bathrooms, with all furniture, bedding, etc.
- 1 cottage, 4 rooms, pantry & bathroom, occupied by F. Russell.
- 1 boardinghouse building, 4 rooms, with furniture, etc.
- 1 adobe building, 2 rooms, formerly occupied by doctor.
- 1 cottage, 3 rooms and bath, with furniture, occupied by M. J. Hughes.
- 1 cottage, 3 rooms and bath, with furniture, occupied by R. J. Davis.
- 1 cottage, 5 rooms and furniture, occupied by H. G. Napier.
- 1 Cottage, 3 rooms and furniture, occupied by B. H. Hughes.
- 1 cottage, 3 rooms and bath, occupied by A. V. Navarro.
- 1 cottage, 4 rooms and bath, occupied by A. Drifill.
- 1 cottage, 4 rooms and bath, & furniture, occupied by T. H. Pomeroy.
- 1 cottage, 4 rooms and bath and furniture, occupied by M. P. Shapleigh.
- 1 cottage, 3 rooms and bath, occupied by Geo. Seelig.
- 1 cabin, 1 room, occupied by Geo. Seelig.
- 1 building, 2 rooms, occupied as postoffice.

2 club houses, 20 rooms furnished—occupied by employees.

1 hospital building, 10 rooms, with hospital furniture, etc.

1 finished adobe garage.

1 galvd. iron garage.

1 machine-shop, with lathe, engines, machinery and equipment.

1 storehouse.

1 carpenter-shop, and storehouse, with saw and equipment.

1 shoe-shop—now rented as barber-shop, adjoining E. G. Gleim store.

Pumping Plant.

1 Galvd. iron pump-house.

1—6 x 8 Deane triplex pump.

1—6 x 10 Deane triplex pump.

1—10 h. p. electric motor, with starting equipment, with all line shafts, counter shafts, pulleys, belting, pipe-lines, etc.

1 wooden building with 2 old steam pumps—not in use.

Miscellaneous.

1 wooden building for lime storage.

1 rock building for lime storage.

1 wooden building for fire hose cart.

1 wagon scales.

1 corral, sheds, etc.

1½ interest in chemical fire extinguisher—kept in machine shop—other 1½ interest owned by E. G. Gleim Co. [274]

1 new 1921 Franklin touring car.

1—5 passenger Ford.

1—Smith-form-a-Ford truck.

At Marfa, Texas.

6 steel oil storage tanks, 109 bbls. each capacity,
with building, motor, two pumps, all piping,
belting, etc., enclosed by fence.

Mine.

Mine Power-house.

1 metal lath and plaster power-house building,
containing

2 De La Vergne oil burning engines, 120 H. P.
each, complete with starting equipment,
etc.

1 Stover gas engine for starting.

1 Ingersoll-Rand air compressor, 15 and 9 x 15
with receiver.

1 Ingersoll-Rand air-compressor 10 x 10.

1 electric generator, with switch boards, regu-
lators, etc.

1 small electric generator, switch-board, etc.

1 experimental flotation machine.

1 metal lath & plaster building for storehouse
and shop.

1 metal lath & plaster building for pump-house,
with pumps and motors.

2 cooling water-towers and tanks.

1 concrete water-tank.

1 galvd. iron building containing steel oil-
storage tank. With all line shafting,
clutches, pulleys, belting, etc.

Core Drill.

- 1 building, containing 1 F-3 Calyx drill and equipment, with gas engine.

East Shaft Hoisting Plant.

- 1 wooden head frame, complete, with station, etc.
- 1 galvd. iron bldg. containing 1 Gates double steam drum, electrified with controller and other equipment, with 2000 ft. wire cable.
- 1 steam boiler, and feed pump, with two oil storage tanks, line, etc.

2 shaft cages.

- 1 stone building, for blacksmith-shop, with forge, drill-press, blower, etc.

- 1 stone building for sample grinder, crusher, gas engine, and other equipment.

- 1 stone building for round house for Ford motors.

- 1 galvd. iron building for carbide storage.

- 1 galvd. iron building, containing two rock-crushers, ore bins, two oil burning engines, one gas engine, triplex pump, one 50 h. p. electric motor, tramway, terminal complete, with all shafting, pulleys, belts, etc.

- 1 aerial tramway complete, with track cables, traction cables, 12 towers to support cables, buckets, etc. About 5200 ft. in length.

- 1 telephone line and instruments for above tramway service. [275]

South Shaft Hoisting Plant.

- 1 mines office building, with furniture, mine map, etc.

1 cottage for mine foreman, with furniture, 5 rooms and bath.

1 cottage for asst. foreman, with furniture, 3 rooms and bath.

1 frame cottage, 3 rooms, unoccupied.

1 old frame building, 1 room.

1 map room building, with 3 rooms.

Several adobe shacks, about 20—occupied by miners.

1 wooden head frame, and ore bins.

1 building containing,

1-35 h. p. W. C. Gas engine, hoist and hoisting cable.

1 building containing,

1 drill sharpener, oil forge, emery wheel, gas engine, etc.

1 rock garage building, containing 1 Delco lighting plant, complete.

1 building for carbide storage.

1 building for oil storage.

1 building for fuse and caps.

1 old wooden store house building.

Corrals and shed.

Joint Tunnel.

1 wooden ore bin.

1 corral and sheds.

Shaft No. 4.

1 wooden head frame.

1 wooden ore bin, 10 ton capacity.

1 bldg. with 6 H. P. gas engine and hoist.

1 blg. for blacksmith-shop.

Shaft #15.

1 bldg. containing 1-6 H. P. gas engine, with hoist—formerly used in bore hole.

1 wooden head frame, cables, etc.

Magazines.

3 powder magazines, for powder storage.

Surface Haulage System.

5200 ft. more or less of 24" gauge track.

2 Ford motors, used as locomotives.

1 Ford motor, used partly on 40 ft. level.

6-2 ton side dump cars.

Miscellaneous.

1-5 passenger Dodge automobile.

1 small Ford truck.

Underground Workings.

About 24 miles, more or less, of tunnels, drifts, cross-cuts, etc. with track, chutes, ladders, windlasses, ore cars, buckets, air hoists, air drills, shovels, hammers, and other tools, wheel barrows, mining tools etc. [276]

PRESIDIO MINING COMPANY.

Inventory of Mine & Mill Supplies on Hand May 1st, 1921.

Articles.	Amount.	Cost.
MINE.		
Dynamite, 40%	20,950 lbs.	\$4310.75
Dynamite, 60%	2,000 lbs.	584.06
Fuse	8,600 ft.	60.96
Blasting Caps,	1,600	25.02
Electric Caps,	4,600	249.00
Igniters,	3,000	158.09

Articles.	Amount.	Cost.
Carbide,	900 lbs.	84.77
Carbide Lamps,	5	15.05
Blacksmith coal,	5 tons	138.28
Drill steel, hand,	30 pcs.	167.10
Pick steel,	1½ bar	2.96
Hammer handles, 18"	36 doz.	25.92
Hammer handles,	27 —	12.00
Pick handles,	67 —	37.56
Round pick shovels,	3	5.57
Mag. Red engine oil,	1½ bbl.	11.46
Oilite,	1½ bbl.	20.88
Mag. Gas engine oil,	2 bbls.	57.86
Engine waste,	1 bale	21.95
Sturtevant crusher.		
Shoes	2	159.35
Dies	2	180.69
E. P. F. Crusher.		
Shoes	3	108.01
Dies	1	27.57
Ore buckets	3	131.52
Wire rope, tramway	1'	1634.94
Tramway traction		
rope,	5600 ft.	2521.82
Hoisting cable,	1400 ft.	293.33
Rubber belt, 16"x6		
ply	52 ft.	104.88
Coal oil [277]	55 gals.	10.17,
		<hr/>
		\$11,161.52

Articles.	Amount.	Cost.
MILL.		
Stamps.		
Boss heads	1	\$55.08
Cams	5	293.15
Cam shafts, 10 stamp	1	175.05
Cam shafts, 5 stamp	2	323.45
Dies	7	102.22
Shoes	5	123.41
Tappetts	2	85.35
Mortars.		
Black liners,	5	100.81
End liners,	12	106.61
Spouts,	3	65.80
Tube Mills.		
Tires	2	196.50
Steel Balls	21,080 lbs.	1414.71
Classifier spirals	209	229.86
Conveyor spirals	152	184.80
Treatment.		
Cyanide	6410 lbs.	2231.11
Lime	141,885 lbs.	1064.23
Ferrous sulphate	31½ bbls.	77.11
Thickeners.		
Gears	1	36.46
Filters.		
Hydehl. Acid	2 cb.	41.10
Worm gears	1	107.74
Wire	1 reel	30.29
Canvas	1	76.66
Burlap	1	9.92

Articles.	Amount.	Cost.
Precipitation.		
Zinc shavings	6400 lbs.	1250.39
Drying & Melting.		
Borax glass	3550 lbs.	845.17
Bi-carbonate soda	2606 lbs.	176.21
Furnace linings	2	240.08
Fire clay	7 sacks	24.45
Power-Eng. D-204.		
Cylinder head	1	600.00
Cylinder lining	1	215.00
Piston	1	608.65
Miscellaneous parts		180.20
[278]		
Power-Eng. 398.		
Cylinder lining	1	\$160.00
Cylinder head	1	625.05
Piston	1	369.95
Compressor cylinder	1	150.00
Compressor piston	1	60.00
Miscellaneous parts		180.20
Power-Eng. 403.		
Complete set of S. I.		
equipment	1	1026.52
Electric lamps,	48	16.23
Liquid base oil	1½ bbl.	31.15
Albany compound	1 bbl.	79.92
Oilite	3 bbls.	111.49
Belt dressing	60 lbs.	35.97
Babbitt	101 lbs.	44.23
Salt	1 sack	4.10

Articles.	Amount.	Cost.
Rubber belting, 4"x5 ply.	65 ft.	34.04
Rubber belting, 6"x6 ply.	60 ft.	60.58
Rubber belting, 8"x6 ply.	100 ft.	131.49
Rubber belting, 10"x8 ply.	110 ft.	274.66
Rubber belting, 14"x7 ply. Elev.	110 ft.	360.19
Rubber belting, 14"x7 ply.	4 pra.	19.82
Rubber gloves	7 sacks	14.40
Cement		
		<hr/> \$15,605.07
In transit—1 FHB piston complete		543.50
		<hr/> \$15,061.57

FUEL ACCOUNT.

Wood	8 cds.	67.33
Fuel Oil	1296.7 bbls.	6746.09
Total of Mine Supplies..	\$11,161.52	
Total of Mill Supplies...	15,605.07	
Total Fuel Account.....	6,813.42	

Grand Total\$33,580.01

E. M. GLEIM.

[Endorsed]: Filed May 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [279]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

**Defendants' Exceptions and Objections to Fourth
and Final Report and Account of Receiver.**

Walter B. Maling, Receiver herein, having filed herein his "Fourth and Final Report and Account of Receiver," in pursuance of the order of this Court made herein on the 6th day of May, 1921, which said order is here referred to and, except as to the title of court and cause, reads as follows, to wit:

**"ORDER AUTHORIZING RECEIVER TO DE-
LIVER PROPERTY TO DEFENDANT
PRESIDIO MINING COMPANY."**

"The Mandate from the United States Circuit Court of Appeals for the Ninth Circuit in this case having been presented and spread upon the minutes of this Court;

NOW, THEREFORE, on motion of R. T. Harding, solicitor for the defendants (but said defendants not waiving directly or indirectly, but on the contrary expressly reserving all objections heretofore made to said receivership, and also the right to claim upon the coming in and settlement of the final account of said Receiver, and at all times and upon all other occasions, that he, the said Receiver, must account for and return to the possession of said defendant corporation, Presidio Mining Company, all of the property which has come into his hands as such Receiver without deduction for costs, [280] judicial allowances, or expenses and/or Receiver's compensation, attorney's fees, commissions, or other charges of said receivership; and now, at all times, insisting that all such charges must be paid by the complainants who have caused said Receiver to be appointed), IT IS HEREBY ORDERED that WALTER B. MALING, Receiver heretofore appointed, turn over and deliver to the defendant Presidio Mining Company all of the property of said defendant in his possession or under his control as such Receiver, except the sum of Five Thousand (\$5,000) Dollars, which is to be retained by him in order to satisfy any balance of commissions and expenses of the receivership, including attorney's fees, which may be allowed him in his final account.

That said Receiver take from said Presidio Mining Company such receipts and acknowledgments as will evidence the payment and delivery of said property, and that he file herein a report and ac-

count of his receivership since his last report and account and present the same to this Court.

That immediately upon the entry of this order herein that the Clerk of this Court certify to a copy thereof and cause the same to be filed with the Clerk of the District Court of the United States for the Western District of Texas, at El Paso, in the auxiliary suit of Overton et al. vs. Presidio Mining Company et al., No. 114—Equity.

Done in open court this 6th day of May, one thousand nine hundred and twenty-one (1921).

WM. C. VAN FLEET,
Judge.”

Now come the defendants, and except and object to said account and to the settlement thereof, and respectfully show to this Honorable Court:

That said Receiver was appointed by this Court without necessity therefor, and against and over the objections of these defendants, as will more fully hereinafter appear; and that on the appeal from said order of appointment, to the United States Circuit Court of Appeals for the Ninth Circuit, the order of this Court appointing said receiver was reversed, and said receiver discharged, for the reason and upon the grounds hereinafter more fully set forth:

That said Receiver filed his first report and account herein on the 2d day of November, 1918, and on the 28th day [281] of December, 1918, he filed a supplemental report thereto. That said reports contained a financial statement and report of said receivership from the 2d day of February, 1918,

the date said Receiver took possession of the office of the defendant, Presidio Mining Company, to the 31st day of October, 1918. That said report and account and supplement thereto were allowed and confirmed by the order of this Court filed herein on the 13th day of January, 1919, but over the exceptions and objections of these defendants, and subject to a certain stipulation between the complainants herein and these defendants, which said stipulation was filed herein on December 11, 1918, and which stipulation is here referred to, and, with the exception of the title of Court and cause, is in the words and figures following, to wit:

“STIPULATION ALLOWING FEES OF RECEIVER AND HIS ATTORNEY.

WALTER B. MALING, Receiver herein, having filed in said Court first above mentioned, his report of his proceedings as such Receiver, from the 23d day of February, 1918, and also having therein asked said Court for an allowance to himself and his attorney, Frank R. Wehe, Esq., on account of their services as such Receiver and attorney herein, covering the year 1918, in order that the expenses of the receivership may be treated as deductions from the net income of such receivership during this fiscal year;

AND IT APPEARING That the above-named defendants and each of them, have heretofore consistently opposed and objected to the appointment of any Receiver in said cause; and that the appointment of said or any Receiver in said action was and

is contended by said defendants to be without any authority or jurisdiction in said Court to make such appointment, and is without any foundation in either the pleadings or the proof or records in said cause, to justify the same; and that the said defendants have preserved for review on appeal by the Circuit Court of Appeals, for the Ninth Judicial Circuit, each and all of their said objections to the appointment of said or any Receiver;

AND IT ALSO APPEARING That on account of the probability that said Court may not be able to hear said record until after the close of the fiscal year on account of the illness of the Judge of said Court who is familiar with all of the said matters, and who appointed said Receiver; [282]

NOW, THEREFORE, IT IS HEREBY STIPULATED That nothing in this stipulation contained shall be, or be construed to be any waiver, surrender, modification, estoppel, or limitation of any kind or character upon said defendants' said objections, and/or upon the full right of said defendants, or each or any of them, to insist in all proper places and at all proper times upon their said objections to the appointment of said or any Receiver, and/or upon any proceedings based upon said or similar objections that said defendants, or any or either of them, may hereinafter be advised to take;

AND IT IS FURTHER HEREBY STIPULATED That the sum of Four Thousand Two Hundred Seventy and 76/100 (\$4,270.76) Dollars is a reasonable sum to be allowed said Receiver as such fees from the 23d day of February, 1918, to the 31st

day of December, 1918, and that a like sum is a reasonable sum to be allowed said Frank R. Wehe for his fees as attorney during the same period, and that any Judge of said Court may make an order to that effect, and that thereupon said Receiver may draw from the funds now in his hands the said sums and pay the same to himself and his said attorney, as above stipulated.

Dated this 11th day of December, A. D. 1918.

WM. F. ROSE,

Attorney and Solicitor for Complainants.

R. T. HARDING and

HENRY E. MONROE,

Attorneys and Solicitors for said Defendants.

J. J. DUNNE,

Of Counsel.

It is so ordered.

M. T. DOOLING,

Judge."

These defendants now except and object to all items of expenditure in said account of said Receiver which would not necessarily or properly have been incurred or expended by the defendant, Presidio Mining Company, in the usual and regular conduct of its business, if the receiver had not been appointed, and had not taken charge of its property, and in particular these defendants now object to the allowance to said receiver of the following items and amounts contained in said report and account, to wit:

\$4270.76 paid to Walter B. Maling on account of Receiver's fees.

4270.76 paid to Frank R. Wehe on account of attorney's fees. [283]

70.00 Court fees.

4500.00 paid to F. C. Handy, Receiver's Assistant at Shafter, Texas, ten months at \$450 per month.

988.33 paid to Receiver's bookkeeper at varying rates.

50.00 paid to premium on Receiver's bond.

579.25 paid for traveling expenses from San Francisco to the mine at Shafter, Texas, and return for W. B. Maling, F. R. Wehe and F. C. Handy.

Total..\$14729.10

That on the 10th day of December, 1919, said Receiver filed herein his second report and account for the period covering the time from the 1st day of November, 1918, to the 1st day of October, 1919, both inclusive. That on the 22d day of December, 1919, these defendants filed herein their objections to said Receiver's second account, but that this Court allowed and confirmed said second report and account on the 13th day of January, 1920, over the objections and exceptions of these defendants. That defendants' objections to receiver's second report are here referred to, and, with the exception of

the title of Court and cause, are in the words and figures following, to wit:

“DEFENDANTS’ OBJECTIONS TO RECEIVER’S SECOND REPORT.

Now come the defendants above named, and in particular the defendant, the Presidio Mining Company, and object to the allowing of the account of Walter B. Maling, the Receiver herein, and to the approval of his report, dated the 10th day of December, 1919, and filed herein on the 10th day of December, 1919; and in this regard these defendants respectfully represent to this Court:

That the Interlocutory Order and Decree appointing Walter B. Maling the Receiver herein was made and entered on the 20th day of February, 1918.

That the Interlocutory Decree determining the legal and equitable rights of the parties hereto was made and entered on the 16th day of February, 1918.

That thereafter, and in due time, appeals were taken by these defendants from both of said decrees to the United States Circuit Court of Appeals, for the Ninth Circuit, and [284] that on stipulation of the parties and the order of said Court, both appeals were heard together and upon the same record.

That in and by said Interlocutory Decree made and entered on the 16th day of February, 1919, a certain Interlocutory Injunction was kept in full force and effect.

That on the 27th day of October, 1919, the said Circuit Court of Appeals filed its opinion in the matter of said appeal directing a final decree to be entered in this Court in accordance with said opinion, and further directing that the Interlocutory Injunction be dissolved and the Receiver discharged.

That the complainants have filed in said Circuit Court of Appeals a petition for Diminution of Record, and that in consequence thereof the mandate of said Court has been stayed.

These defendants further represent to this Honorable Court that in the original and in all subsequent complaints, and on various motions made by them in open Court, the Complainants sought the appointment of a Receiver herein; but that on each and every occasion when the complainants sought the appointment of such Receiver, these defendants, and each of them, resisted such appointment with all the power at their command.

That after this Honorable Court had filed its opinion and decision herein directing among other things, the appointment of a Receiver but before the appointment of such Receiver, these defendants filed herein their petition and motion, and notice of motion to reopen this cause, and with all the power at their command opposed and resisted the appointment of a Receiver herein upon the ground that the appointment of such Receiver would be erroneous and unlawful, and not necessary for the protection of the rights of the complainants; but the Complainants, with all the power at their command

again urged and insisted upon the appointment of a Receiver herein.

These defendants further represent to this Honorable Court that when under the aforesaid circumstances, the appointment of a Receiver is finally determined to be erroneous, that such Receiver is compelled to return the property without deduction of any kind to the person from whom it has thus unlawfully been taken; and if the fees and expenses of such Receivership are to be paid at all, they are to be paid, not out of the fund which has thus wrongfully come into the hands of the Receiver, but by the parties litigant who have caused such Receiver to be appointed.

These defendants, for the reasons aforesaid, object therefore;

(1) To the allowance and payment of any fees of said Receiver either for himself or for his attorney out of the fund now in his possession.

(2) The disbursements of the Receiver set forth on page 5 of said Report and Account and recapitulated on page 7 thereof include the sum of \$430 per month for twelve months, since the filing of the Receiver's last account and report, [285] paid to F. C. Handy, an assistant or deputy employed by said Receiver, and \$100 per month for the same period of twelve months paid to Florence M. Handy, a bookkeeper employed by said Receiver, making a total of \$6600; that said sums are strictly expenses, of receivership and were not to any extent whatsoever expenses that would have been incurred by these defendants had there been no receivership;

but, on the contrary, the services for which said payments were made would have been, and previous to the appointment of said Receiver were, performed by the duly elected officers of the corporation, Presidio Mining Company.

(3) The said disbursements of said Receiver also includes traveling expenses amounting to \$826.56, Clerk's fees amounting to \$15, Premium on Receiver's Bond amounting to \$50 and the sum of \$3699.40 paid to Haskins and Sells, accountants, (said latter sum being incurred upon the insistence of the complainants), all of which sums are expenses of said Receivership, and no part of which would have been incurred or paid except for said receivership.

(4) That no part of said sums above specified, nor of the compensation now asked for by said Receiver for himself and his attorney for the period since the filing of said Receiver's last account, are properly or legally payable out of, or deductible from, the funds of the defendant, Presidio Mining Company.

WHEREFORE this defendant prays that the said sums hereinbefore referred to, be deducted from the operation and administration expenses of the defendant, Presidio Mining Company, and be not allowed, and that no fees be allowed for said Re-

ceiver, either for himself or his attorney, otherwise than to be paid by the Complainants herein.

Respectfully submitted,

PRESIDIO MINING COMPANY, a Corporation,

WM. S. NOYES,

B. S. NOYES,

L. OSBORN,

JOHN W. F. PEAT, and

L. M. DOHERTY,

Defendants.

By R. T. HARDING,

HENRY E. MONROE,

Their Solicitors.

J. J. DUNNE,

Of Counsel."

These defendants now except and object to all items of expenditure in said second account of said receiver which would not necessarily or properly have been incurred or expended by the defendant, Presidio Mining Company, in the usual and regular conduct of its business, if the receiver had not been [286] appointed, and had not taken charge of its property, and in particular these defendants now object to the allowance to said receiver of the following items and amounts contained in said report and account, to wit:

\$5000.00 paid to Walter B. Maling, as Receiver's fees.

\$5000.00 paid to Frank R. Wehe as attorney's fees for said Receiver.

\$5400.00 paid to F. C. Handy, Receiver's Assistant
at Shafter, Texas.

\$1225.00 paid to Receiver's bookkeeper.

\$ 50.00 paid on account of premium on Receiver's
bond.

\$ 546.56 traveling expenses of W. B. Maling, F. R.
Wehe and F. C. Handy.

\$3679.40 paid to Haskins & Sells, certified account-
ants.

\$2500.00 as fees paid to the Master in Chancery
herein.

As to said sum of \$3679.40 paid to Haskins & Sells for auditing the books of the defendant, the Presidio Mining Company, these defendants aver that said expenditure was incurred by said Receiver upon the insistence of the complainants, and was wholly unnecessary, and of no value to these defendants, or any of them.

As to the expenditure of said sum of \$2500.00 paid as fees to the Master in Chancery of this Court for taking an account under and in pursuance of the Interlocutory Decree entered herein, these defendants aver that the following proceedings took place before said Master in Chancery at the commencement of said hearing:

“In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division, before Hon. H. N. Wright, Standing Master in Chancery, on June 24, 1918, an outline of the situation and a state-

ment of the case was made by W. S. Rose, Esq., Solicitor for the complainants. In this outline and statement, said solicitor for said complainants, after reciting the facts and history of the cause as claimed by him, stated, 'that, in substance, is the outline of the status as it comes to the Master for the accounting.' Said solicitor then closed his statement with the remark, 'I think that covers an outline of the situation so far as the statement to the Master is concerned at this time.'

Thereupon, the following proceedings were had:

'Mr. DUNNE.—The present hearing, Mr. Rose, as I gather it, is to be traced back to the interlocutory decree which was given [287] in this action?

Mr. ROSE.—Yes.

Mr. DUNNE.—And the authority, so to speak, of the Master to proceed in the present inquiry is based on that interlocutory decree?

Mr. ROSE.—Absolutely, yes.

Mr. DUNNE.—And you will concede, I hope, that an appeal has been taken from that interlocutory decree?

Mr. ROSE.—Yes. Excuse me, Mr. Dunne, I meant to mention that, that an appeal has been taken.

Mr. DUNNE.—Yes. I therefore object to any proceedings being had in the present instance, on the ground that an appeal has been perfected from that decree, that the decree is suspended pending the appeal. I don't suppose it would be admissible in evidence, even, in a controversy between the parties. To preserve the rights of the persons whom

we represent, it being conceded here that this appeal has been perfected, we wish to make the objection that the Master in Chancery is without authority or jurisdiction to proceed at this time, pending the decision on appeal from the interlocutory decree to which is traced and on which is based his authority to act at all.

Mr. ROSE.—The answer to that is that the appeal and the proceedings subsequent to the entry of this decree do not stay the carrying on of the suit, or of all transactions leading to a final decree subsequent to the appeal from the interlocutory decree, or, rather, both, as the appointing of a receiver in this case, and as to injunctions and the statements of the decree itself. The fact that there is an appeal does not stay the proceedings. I believe that will be conceded. If it is necessary I will produce the authority to show that that is a fact. I do not think that there is a question, your Honor, as to the right to proceed now.

The MASTER.—I never had the question raised before. My impression is that the objection is without merit and it will be accordingly overruled.

Mr. DUNNE.—And to the ruling of the court in that respect the defendants respectfully note an exception. I suppose I should use the word ‘respondent,’ it being an equity suit.

The MASTER.—That is immaterial. In the new rules, I understand that that distinction has been done away with; they speak of plaintiff and defendant.’ ”

That said receiver filed his third report and account herein on the 30th day of November, 1920, covering the time from the 1st day of November, 1919, to the 31st day of October, 1920, inclusive. That on the 4th day of December, 1920, this Court allowed and confirmed said report, over the objections and exceptions of these defendants, and in this behalf these defendants aver that prior to the allowance of said account, and on the 4th day of December, 1920, these defendants filed "Objections of Defendants to the Allowance of, and to Settlement of. [288] Receiver's Account," which said objections, except as to the title of court and cause, are in the words and figures following, to wit:

"Walter B. Maling, Receiver herein, having filed in said Court first above mentioned his report and account of his proceedings as such Receiver from the 1st day of November, 1919, to the 31st day of October, 1920, inclusive, and also having therein asked said Court for an allowance to himself and his attorney, Frank R. Wehe, Esq., on account of their services as such Receiver and attorney herein, covering the calendar year One Thousand Nine Hundred and Twenty, in order that the expenses of the receivership may be treated as deductions from the net income of said receivership during said fiscal year;

Now come the defendants in the above-entitled cause, and object to the settlement of said account, and hereby reserve to themselves the right at all future times, to object to any and all of the actions and proceedings of said Receiver, and to insist in

all proper places and at all proper times upon their said objections, and upon objections heretofore made, to the appointment of said, or any, Receiver, and/or upon any proceedings based upon said, or similar, objections that said defendants, or any of them, heretofore have made, or may hereafter be submitted;

Said defendants concede that if said receivership is proper, and said Receiver was legally and properly appointed, that then the sum of Ten Thousand (10,000) Dollars is a reasonable sum to be allowed to said Receiver, (Five Thousand (5,000) Dollars for himself and Five Thousand (5,000) Dollars for his said attorney), covering the full fiscal year of One Thousand Nine Hundred and Twenty;

As to the allowance of said account, and as to the allowance to said Receiver and his said attorney, these defendants further state that said defendants claim that in the event the order appointing said Receiver is reversed by the United States Circuit Court of Appeals, that then said Receiver must redeliver the property of the defendant, Presidio Mining Company, to it without deduction;

And the defendants now make the further specific objection to said account, that the sum of Fourteen Hundred and Seventy-five (1475) Dollars paid to Florence M. Handy, the bookkeeper of said Receiver, and the sum of Five Thousand Four Hundred (5400) Dollars paid to F. C. Handy, the representative of the Receiver at the mine, are erroneously included in the statement of expenses of operation, on page six (6) of said report, but that

they are in fact expenses of the receivership, and would not have been incurred or paid, except for said receivership.

Dated this 4th day of December, One Thousand Nine Hundred and Twenty (1920).

R. T. HARDING and
HENRY E. MONROE,

Attorneys and Solicitors for Said Defendants.”

[289]

These defendants now except and object to all items of expenditure in said last-mentioned account of said receiver which would not necessarily or properly have been incurred or expended by the defendant, Presidio Mining Company, in the usual and regular conduct of its business, if the receiver had not been appointed, and had not taken charge of its property, and in particular, these defendants now object to the allowance to said receiver of the following items and amounts contained in said report and account, to wit:

\$5000.00 paid to Walter B. Maling, as receiver's fees.

\$5000.00 paid to Frank Rl. Wehe, as attorney's fees for said receiver.

\$5400.00 paid to F. C. Handy as Receiver's Assistant at Shafter, Texas.

\$1500.00 paid to receiver's bookkeeper.

\$ 50.00 paid as premium on Receiver's bond.

That said receiver filed herein his said “Fourth and Final Report and Account of Receiver,” on the 27th day of May, 1921, covering the period of time from the 1st day of November, 1920, to the 6th day

of May, 1921, inclusive, and these defendants except and object to all items of expenditure in said account which would not necessarily or properly have been incurred or expended by the defendant, Presidio Mining Company, in the usual and regular conduct of its business, if the receiver had not been appointed, and had not taken charge of the property, and these defendants object to the allowance to said receiver of the following items and amounts contained in said report and account, to wit:

\$2100.00 paid to F. C. Handy, the receiver's assistant at Shafter, Texas.

\$ 500.00 paid to receiver's bookkeeper.

\$ 50.00 paid on account of premium on receiver's bond [290]

That in said last-mentioned report and account, said Receiver states that the fees of himself and attorney have been paid to the 31st day of December, 1920, and prays that fees of himself and his attorney since the 31st day of December, 1920, be ordered paid from the balance of the funds now in his hands; but these defendants except and object to the payment of any further fees to said Receiver and his said attorney, and in this behalf, and as to all other items and amounts hereinabove specified and excepted to and objected to, in any of the aforesaid four accounts, these defendants represent, urge and contend that upon the principle of law that if the appointment of a Receiver is erroneous or void, and the advance party does not acquiesce in it, but continues to contest it to a successful determination, any compensation which may accrue to the Receiver in

the meantime, and his expenses incurred in the administration of the estate, must be taxed to the party who applied to have the appointment made.

As to any of the aforesaid specified items or amounts to the allowance of which these defendants are now objecting and excepting, which may be in whole or in part included in the general statements of expenditures of any of the aforesaid accounts, these defendants pray that the Receiver may be examined in open court, as to such expenditures or payments made by him, which are not disclosed upon the face of the said four accounts, or any of them. [291]

These defendants further aver and respectfully represent to this Court that throughout this cause, and whenever the opportunity presented itself, they resisted with all the power at their command, the appointment of a Receiver herein, and in this behalf show:

That the original bill of complaint was filed in this Court and cause on July 26, 1915, to which reference is hereby made. That the prayer in said bill of complaint is as follows:

“Your orators further pray that the Court and your Honor may decree as follows:

1. For an injunction restraining and preventing the said directors and officers of said Presidio Mining Company, the defendants, and each and every one of them, and each of their counsellors, attorneys, solicitors, agents, servants, employees, and all parties acting by, through, or under them, or either or any one of them, or in aid, or in assistance of

them, or either, or any one of them, from the further commission of any, or similar acts, as is in this bill of complaint averred and complained of, or of further carrying on the business of the said Presidio Mining Company.

2. That all salaries for said directors and officers in San Francisco be forthwith cut off, and said directors and officers be restrained from collecting any further salaries or any money on account of alleged back salaries from said corporation pending the final determination of this action, or from further paying out any sums of money whatsoever to any of the officers or directors of said corporation at San Francisco, or any one in collusion with them, or on any account whatsoever; and, further, from disposing of, or otherwise paying out, any sums of money whatsoever, now on hand, or derived from the sale of ore or bullion mined, extracted, milled, smelted, or otherwise acquired from the property of the Presidio Mining Company, or from Section 5 above described, on any account whatsoever until the further order of this Court.

3. That said defendants, and each and all of them, be further restrained from selling or in any other manner disposing of any stock held by them either individually or as trustees, in the Presidio Mining Company or the Silver Hill Mill and Mining Company.

4. That said directors and officers, defendants, be removed from officers either as directors or officers of this company.

5. That said Wm. S. Noyes be prohibited and [292] restrained from transferring title to said Section 5 to any person, or persons, whomsoever; and further, that said Wm. S. Noyes be prohibited and restrained from collecting any sum or sums whatsoever on account of any contract or contracts heretofore made by him with the Presidio Mining Company for any part or percentage of any ore mined, extracted, milled or smelted from Section 5 aforesaid; and that he be further restrained from disposing of any ore or bullion, or any sums of money now on hand, derived in any manner from ores mined, extracted, milled or smelted from either the property of the Presidio Mining Company or from said Section 5, excepting that said Wm. S. Noyes be required and compelled to transfer said Section 5 to said Presidio Mining Company, and on such terms as equity may require.

6. That an accounting be had in the premises pursuant to and under orders of this Court, and that a restitution be required from the proper parties defendant to said corporation and its stockholders and your orators herein, and that said defendants be compelled to make such restitution as may appear just and proper and as to this Honorable Court may appear equitable in the premises.

7. That a temporary receiver be appointed to take charge of all of the affairs and business of said Presidio Mining Company and of all its funds and property, subject to the direction of this Honorable Court.

8. For restitution to said corporation in the sum of, to wit, \$150,000.

9. That the complainants may have such other and further relief as to this Court and your Honor may seem equitable in the premises, together with complainant's costs of suit."

That thereupon these defendants, and each of them, moved this Honorable Court to dismiss said bill of complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against them, and that on the 19th day of August, 1915, this Honorable Court rendered its opinion on an order denying the application for the appointment of a Receiver and for an injunction *pendente lite*. That said opinion was filed in this Court and cause on the 19th day of August, 1915, and is, except as to title and cause, in the words and figures as follows, to wit: [293]

"The bill here does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company. Nor does it show that the lease between said defendants is not a profitable one for the Mining Company. Nor does it show that defendant Noyes is not the owner of the leased property, or that the defendant Company has any legal or equitable interest therein. The most that can be said of this bill is that it avers the payment of extravagant salaries to its officers.

The application for a receiver will be denied. The application for an injunction *pendente lite* will

be denied with leave to renew the same upon the filing of an amended bill.

The motion to dismiss will be granted unless plaintiffs within twenty days file an amended bill stating a case for the granting of equitable relief.

August 19th, 1915.

M. T. DOOLING,
Judge."

That thereafter, on the 25th day of September, 1915, the complainants filed herein an amended bill of complaint, to which reference is hereby made. That the prayer in said amended bill of complaint is as follows:

"WHEREFORE, your orators pray this Honorable Court, that the said defendants, and each and every one of them, answer this amended bill of complaint, and to abide by and perform said order and decree in the premises as to this Court shall seem proper.

Your orators further pray that this Court and your Honor may decree as follows:

1. For an injunction restraining and preventing the said directors and officers of said Presidio Mining Company, the defendants, and each and every one of them, and each of their counsellors, attorneys, solicitors, agents, servants, employees, and all parties acting by, through, or under them, or either or any of them or in aid, or in assistance of them or either or any one of them, from the further commission of any, or similar acts, as is in this amended bill of complaint averred and complained of, or of further

carrying on the business of the said Presidio Mining Company.

2. That a receiver be appointed to take charge, control or possession of the San Francisco office of said Presidio Mining Company, its books, records, vouchers, business and affairs, and impound and keep all moneys derived from [294] its said mining enterprise, after payment of operating expenses, and subject to the order of this Honorable Court.

3. That said Receiver also be authorized to receive and hold all moneys derived from operations on Section 5, subject to the order of this Honorable Court.

4. That all salaries for said directors and officers in San Francisco be forthwith cut off, and said directors and officers be restrained from collecting any further salaries or any money on account of alleged back salaries from said corporation pending the final determination of this action, or from further paying out any sums of money whatsoever to any of the officers or directors of said corporation at San Francisco, or any one in collusion with them, or on any amount whatsoever; and further, from disposing of, or otherwise paying out, any sum of money whatsoever, now on hand, or derived from the sale of ore or bullion mined, extracted, milled, smelted, or otherwise acquired from the property of the Presidio Mining Company, or from Section 5 above described, on any account whatsoever until the further order of this Court.

5. That said defendants, and each and all of them, be further restrained from selling, or in any other

manner disposing of any stock held by them, either individually or as trustees, in the Presidio Mining Company or the Silver Hill Mill & Mining Company.

6. That the said directors and officers, defendants, be removed from office either as directors or officers of this company.

7. That said Wm. S. Noyes be prohibited and restrained from transferring title to said Section 5 to any person, or persons, whomsoever; and further, that said Wm. S. Noyes be prohibited and restrained from collecting any sum or sums whatsoever on account of any contract or contracts heretofore made by him with the Presidio Mining Company for any part or percentage of any ore mined, extracted, milled or smelted from Section 5 aforesaid; and that he be further restrained from disposing of any ore or bullion, or any sums of money now on hand, derived in any manner from ores mined, extracted, milled or smelted from either the property of the Presidio Mining Company, or from said Section 5.

8. That said Wm. S. Noyes be adjudged to be a trustee of said Section 5, for the benefit of the stockholders of said Presidio Mining Company, as to any and all profits made by him from Section 5, and otherwise, from his profits received directly or indirectly from his connection with said Presidio Mining Company, and other than from his salary of \$450 monthly; and that he be required to transfer said Section 5 to said corporation, on such terms as equity may require.

9. That said defendants, each, every and all, be held to be trustees for the benefit of the stockholders of said Presidio Mining Company, and of your orators herein, as to any and all profits, benefits, emoluments, received [295] by them, either directly or indirectly, while connected with said corporation and in its employ.

10. That said defendants be required to make restitution to said minority stockholders of said Presidio Mining Company, and your orators herein, for such amount as may be ascertained to be due.

11. That if any profits and benefits received by said Wm. S. Noyes have been used for the purchase of other properties that such properties be declared, to be held by him in trust for the Presidio Mining Company, and said Wm. S. Noyes be required to account therefor.

12. That if any profits and benefits obtained by any of the defendants, other than Wm. S. Noyes, have been used for the purchase of other properties, that such properties be declared to be held by them or either, or any one of them, in trust for the Presidio Mining Company, and that accounting be required therefor.

13. In the alternative that other relief be impracticable, that the value of complainants' interest and the interests of all other stockholders similarly situated, in the property of Wm. S. Noyes be determined, and that the complainants and all other stockholders similarly situated be declared to have a lien upon the assets and properties of Wm. S.

Noyes, for the value of their interests so determined.

14. That an accounting be had in the premises pursuant to and under the orders of this Court, and that restitution be required from the proper parties defendant to said corporation, its stockholders, and your orators herein, and as may appear equitable in the premises to this Honorable Court.

15. That the complainants may have such other and further relief as to this Court and your Honor may seem equitable in the premises, together with complainants' counsel fees and costs of suit."

That thereafter on the 11th day of October, 1915, these defendants filed herein their answers under oath, specifically denying the equities of said amended bill of complaint, to which said answers reference is hereby made.

That at the time of filing their said answers, these defendants also filed their motion to strike out certain portions of said amended bill of complaint, and to dismiss the same, on the ground that it did not state facts sufficient to constitute a cause of action against them. That thereafter [296] said motion came on for argument before this Court, and these defendants presented arguments and cited authorities in support of their contention that said amended bill of complaint should be dismissed for want of equity. That thereafter, on the 28th day of December, 1915, this Honorable Court rendered its oral opinion denying said motion to dismiss, and also said motion to strike, and on the same day made its "Order Denying Motion to Dis-

miss and Application for Receiver, and Granting preliminary Injunction," which said order, except as to title and Court, is in the words and figures following, to wit:

"Defendant's motion to dismiss the amended bill of complaint and motion to strike out parts of the amended bill of complaint and plaintiffs' application for the appointment of a receiver and application for a preliminary injunction; heretofore heard and submitted being now fully considered and the Court having rendered its oral opinion, it is ordered that said motion to dismiss and said motion to strike out be and the same are hereby denied; that said application for the appointment of a receiver be and the same is hereby denied, without prejudice; and that said application for a preliminary injunction be and the same is hereby granted; a formal order for said injunction to be submitted to the Judge for signature and filed."

That thereafter, on the 30th day of December, 1915, on motion of complainants, this Court made herein its further "Order for Preliminary Injunction," wherein and whereby it enjoined these defendants from drawing or paying to themselves any further sum or sums of money from the Presidio Mining Company on account of ore taken from Section 5, mentioned in said amended bill of complaint, and restraining said defendant Presidio Mining Company from paying any money to the defendant Wm. S. Noyes, on account of said Section

5, and restraining the defendant Wm. S. Noyes from *transferring* said Section 5, or any interest therein, pending the determination of this suit, or from in any manner clouding the [297] *the* title thereto.

That said order, except as to title and cause, is in the words and figures as follows, to wit:

“ORDER FOR PRELIMINARY INJUNCTION.

The motion for the preliminary injunction herein having been duly and regularly heard and submitted to this Court, and it appearing that cause exists for the granting of such injunction pending final hearing of this cause as prayed for,

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue out of this court upon the giving and filing of a good and sufficient bond in the sum of Five Thousand (\$5,000), to be approved by the clerk of this court, pursuant to the prayer of said amended bill of complaint, strictly commanding and enjoining until the further order of this Court the defendant Wm. S. Noyes above named, his agents, servants, employees, representatives or attorneys, and all persons acting in aid of them, or either or any of them, from drawing or paying to themselves any further sum or sums of money from the said Presidio Mining Company on account of ore taken or extracted from Section 5 mentioned in the amended bill, and that said company be restrained from paying any money to said Wm. S. Noyes, or any one in his behalf, on account of said Section 5, either directly or indirectly, or on account

of any ores heretofore or hereafter produced therefrom; and further restraining said Wm. S. Noyes from transferring said Section 5, otherwise known as survey No. 5, Block No. 8, of the survey of the Houston & Texas Central Railway Company, or any interest therein, pending the determination of this suit, or from in any manner clouding the title thereto.

Done in open court this 30th day of December, A. D. 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 30, 1915. Walter B. Maling, Clerk."

That thereafter, on the 30th day of December, 1915, this Court, on motion of complainants, made its preliminary injunction against these defendants, and in particular against the defendant Wm. S. Noyes, which said preliminary injunction is in the words and figures as follows, to wit: [298]

“PRELIMINARY INJUNCTION.

“The United States of America,
Northern District of California,—ss.

The President of the United States of America, to
Wm. S. Noyes, His Agents, Servants, Employees,
Representatives, or Attorneys, and Each
of Them, GREETING:

Whereas, on this 30th day of December, A. D. 1915, an order in the above court and suit was made directing that a preliminary injunction issue herein, and wherein and whereby it was ordered,

adjudged and decreed that Wm. S. Noyes, his agents, servants, employees, representatives or attorneys, and each of them, be enjoined and restrained from drawing or paying to themselves any further sum or sums of money from the said Presidio Mining Company on account of ore taken or extracted from Section 5 mentioned in the amended bill, and further restraining said Wm. S. Noyes from transferring said Section 5, or any interest therein, pending the determination of this suit, or from in any manner clouding the title thereto.

Now, therefore, in accordance with the terms of said order directing that a preliminary injunction issue in said suit, we hereby strictly command and enjoin you, the said Wm. S. Noyes, your agents, servants, employees, representatives or attorneys, and all persons acting in aid of you, or either or any of you, from drawing or paying to yourselves any further sum or sums of money from the said Presidio Mining Company, directly or indirectly, for ores heretofore or hereafter produced or extracted from Section 5 mentioned in the complainants' amended bill of complaint, and we do hereby further strictly command and enjoin the Presidio Mining Company, its officers or agents, to refrain from paying to said Wm. S. Noyes, or any one in his behalf, either directly or indirectly, any moneys on account of ores heretofore or hereafter produced from said Section 5; and we do further strictly command and enjoin you, Wm. S. Noyes, to refrain from either directly or indirectly transferring said Section 5, otherwise known as Survey No. 5,

Block No. 8, of the Survey of the Houston & Texas Central Railway Company, or any interest therein, pending the determination of this suit, or from in any manner clouding the title thereto, which commands and injunction you and each of you are respectfully required to observe and obey until other or further orders of said District Court shall be made in the premises.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 30th day of December, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal] (Signed) WALTER B. MALING,

By _____,
Clerk. [299]

That thereafter, on March 16, 1916, and by leave of Court, the complainants filed herein their "Supplemental Bill to the First Amended Complaint," to which reference is hereby made; and on the same day the complainants also filed their "Amendment to Amended Bill of Complaint," to which reference is also here made.

That on the 23d day of March, 1916, these defendants filed herein their answer, under oath, to said "Supplemental Bill to First Amended Complaint," and also to said "Amendment to Amended Bill of Complaint," denying specifically the averments of said two pleadings, and reference to said answer is here made.

That the aforesaid "Supplemental Bill to the First Amended Complaint," and "Amendment to

Amended Bill of Complaint," were filed in this court and cause on the morning of the day of the commencement of the trial of this cause on its merits, and that immediately after the filing of said two pleadings, and before proceeding with the trial of this cause, these defendants again moved this Honorable Court to dismiss the bill of complaint herein as so amended, on the ground that said bill did not state a cause of action, but this Court denied said motion, and ordered the trial of this cause to proceed.

That thereafter, on August 29, 1916, the complainants, by leave of Court first had, filed an "Amended Prayer to Complainants' Amended Bill of Complaint," to which reference is here made, and which except as to title of court and cause, is in the words and figures following, to wit: [300]

**"AMENDED PRAYER TO COMPLAINANTS'
AMENDED BILL OF COMPLAINT.**

By leave of Court first herein had and obtained, complainants file this their amended prayer to their amended bill of complaint heretofore filed herein, and pray for a judgment and decree of this Honorable Court as follows:

1. For an injunction restraining and preventing the said directors and officers of said Presidio Mining Company, the defendants, and each and every one of them, and each of their counsels, attorneys, solicitors, agents, servants, employees, and all parties acting by, through, or under them, or either or any of them, or in aid, or in assistance of them, or either, or any of them, from the further

commission of any, or similar acts, as in this amended bill of complaint averred and complained of, or of further carrying on the business of the said Presidio Mining Company.

2. That all leases, bonuses and contracts entered into, adopted and ratified by the directors, officers, and majority stockholders of the Presidio Mining Company with other parties be declared null and void so far as may be deemed necessary to this Honorable Court, including the leases of January 25, 1913, the bonus resolution of February 15, 1913, and the contract of November 19, 1913.

3. That all salaries for said directors and officers of San Francisco be forthwith cut off, and said directors and officers be restrained from collecting any further salaries or any money on account of alleged back salaries from said corporation pending the final determination of this action, or from further paying out any sums of money whatsoever to any of the officers or directors of said corporation at San Francisco, or anyone in collusion with them; and, further, from disposing of, or otherwise paying out, any sums of money, whatsoever, now on hand, or derived from the sale of ore or bullion mined, extracted, milled, smelted, or otherwise acquired from the property of the Presidio Mining Company, or from Section 5 above described, or any account whatsoever, and subject to the further order of this Court.

4. That said directors and officers, defendants, be removed from office either as directors or officers of this company.

5. That said defendants each and all be restrained from selling or in any other manner disposing of all or any of the capital stock of the Presidio Mining Company held by them, or either or any of them, individually or as trustees, or directly or indirectly held by them; that said stock be deposited with the clerk of this court, subject to its orders and decrees.

6. That said defendants, and each of them, return to this corporation all salaries received by them from the treasury of the Presidio Mining Company since January, 1913. That Wm. S. Noyes be required to return the sum of \$200 per [301] month excess salary paid to E. M. Gleim without authority from January and August, 1913.

7. That said defendants, each, every and all, be held to be trustees for the benefit of said Presidio Mining Company and its minority stockholders, as to any and all profits, benefits, emoluments, received by them, either directly or indirectly, while connected with said corporation and in its employ, and other than salaries.

8. That said defendants be required to make restitution to said Presidio Mining Company and its minority stockholders for such amount as may be ascertained to be due.

9. That if any profits and benefits obtained by any of the defendants, other than Wm. S. Noyes, have been used for the purchase of other properties or other investments, that such properties and investments be declared to be held by them, or either or any of them, in trust for the Presidio Mining

Company and its minority stockholders, and that accounting be required therefor.

10. That said Wm. S. Noyes be prohibited and restrained from transferring title to said Section 5 to any person, or persons, whomsoever; and further, that said Wm. Noyes, be prohibited and restrained from collecting any sum or sums whatsoever on account of any contract or contracts heretofore made by him with the Presidio Mining Company for any part or percentage of any ore mined, extracted, milled or smelted from Section 5 aforesaid; and that he be further restrained from disposing of any ore or bullion, or any sums of money now on hand, derived in any manner from ores mined, extracted, milled or smelted from either the property of the Presidio Mining Company, or from said Section 5.

11. That said Wm. S. Noyes be adjudged to be a trustee of said Section 5, for the benefit of the stockholders of said Presidio Mining Company, as to any and all profits made by him from Section 5, and otherwise, from his profits received directly or indirectly from his connection with said Presidio Mining Company, and other than from his salary of \$450 monthly; that the Court decree that a constructive trust is impressed upon said Section 5 in favor of the Presidio Mining Company; that it be adjudged that Wm. S. Noyes has the legal title, and that the equitable title has been in said Presidio Mining Company to Section 5 since its purchase by Wm. S. Noyes.

12. That said Wm. S. Noyes be required to transfer said Section 5 to the Presidio Mining Company on such terms as equity may require.

13. That if any profits or benefits received by said Wm. S. Noyes have been used for the purchase of other properties or used for other investment, that such properties and investments, together with the accretions thereto, be declared to be held by him in trust for the Presidio Mining Company and its minority stockholders, and said Wm. S. Noyes be required to account therefor. [302]

14. That said capital stock of defendants deposited with the Clerk of this Court be transferred to the treasury of the Presidio Mining Company at the rate of 15 cents per share, to liquidate their indebtedness to this corporation so far as may be according to their several liability to this corporation and its minority stockholders.

15. That all property and assets of said respective defendants be subjected to a lien of judgment against said respective defendants in favor of the Presidio Mining Company and its minority stockholders, subject to the provision of paragraph 14 hereof.

16. That an accounting be had in the premises pursuant to and under the orders of this Honorable Court; that restitution be required from the proper parties defendant to said corporation and its minority stockholders as may appear equitable in the premises to this Court.

17. That complainants have judgment for their costs, to include all costs of traveling, incidental

expenses, and payments made by complainants in investigating the affairs and business of the Presidio Mining Company in connection with this suit, and for damages sustained by complainant Overton for his loss of time and detention from his business interest, and for complainants' counsel fees. That said respective sums be declared to be a first lien on all the property and assets of the corporation, including Section 5, payable as the Court may direct; and if necessary to wind up the affairs of this corporation, that from the sale of its assets said moneys be paid before any distribution be made to its stockholders.

18. That a receiver be appointed by this Honorable Court to take entire charge of the affairs, assets and property of the Presidio Mining Company, wherever situate, for a period of six months, or such further time as the Court direct, with full power and authority to appoint all assistants required. That unless there is an adjustment between all parties to this suit, the majority and minority stockholders of said corporation, within said period, that said receiver so appointed by this Court be authorized to sell the entire property and assets of the Presidio Mining Company, wind up its affairs, including Section 5, and that said Wm. S. Noyes and the other defendants be prohibited from in any way participating in said sale directly or indirectly, or from having anything further to do with the said Section 8 or Section 5, or with the affairs of what is now the Presidio Mining Company.

19. That the complainants may have such other and further judgment and decree as to this Honorable Court may seem equitable in the premises.

WM. F. ROSE and

BRUCE GLIDDEN,

Solicitors for Complainants.

CHARLES CLYDE SPICER,

Of Counsel.

[Endorsed]: Filed Aug. 29, 1916. Walter B. Maling, Clerk." [303]

That thereafter, on the 12th day of December, 1916, this Court, on motion of complainants, made its further "Order for Injunction Pendente Lite," wherein and whereby this Court compelled the defendants, Wm. S. Noyes, B. S. Noyes and L. Osborn, forthwith to deposit with the Clerk of this Court 59,544 $\frac{5}{6}$ shares of the capital stock of the defendant, Presidio Mining Company. That said last-mentioned order is, except as to title of Court and cause, in the words and figures following:

"ORDER FOR INJUNCTION PENDENTE
LITE.

"A motion for injunction *pendente lite* herein having been duly and regularly heard and submitted to this Court, and it appearing that cause exists for the granting of such injunction pending final hearing of this cause, as prayed for:

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED, That an injunction *pendente lite* issue out of this Court, upon giving and filing of a good and sufficient bond in

the sum of Two Thousand Five Hundred Dollars (\$2,500), to be approved by the clerk of this Court, pursuant to the motion heretofore made and submitted herein by complainants, strictly commanding and enjoining, until the further order of this Court, the defendants Wm. S. Noyes, B. S. Noyes and L. Osborn, and each of their and his agents, servants, employees, representatives or attorneys, and all persons acting in aid of them, or either or any of them, from transferring any or all of 59,544 $\frac{5}{6}$ shares of the capital stock of the Presidio Mining Company held by L. Osborn in December, 1912, represented by certificate No. 67 for 57,213 $\frac{1}{3}$ shares, and certificate No. 80 for 2,331 $\frac{1}{2}$ shares of said capital stock, the said original capital stock represented by said original certificates 67 and 80 now standing on the books of this corporation as follows:

Cert. No 131, dated October 21, 1916,

to Wm. S. Noyes, Pledgee of L.

Osborn25,000 shares

Cert. No. 134, dated October 25, 1916,

Frank M. Purcells..... 1,000 shares

Cert. No. 135, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 136, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 137, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 138, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 139, dated Oct. 25, 1916, Wm.

S. Noyes.....15,000 shares

8618 shares additional to the foregoing

45,000 shares being distributed to

Wm. S. Noyes from said original

amounts in various other certifi-

cates 8,618 shares

And $59265\frac{5}{6}$ shares standing in the

name of B. S. Noyes as a part of

Certificate 133, issued October 21,

1916 $5,9265\frac{5}{6}$

Total..... $59,5445\frac{5}{6}$

It is further ORDERED, ADJUDGED AND DECREED, that said respective parties, Wm. S. Noyes, B. S. Noyes, and L. Osborn, forthwith deposit with the clerk of this Court the foregoing total number of shares, to wit: $59,5445\frac{5}{6}$ shares, subject to the further orders of this Court.

Done in open court this 12th day of December, A. D. 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 12, 1916. Walter B. Maling, Clerk."

That thereafter, on said 12th day of December, 1916, this Court, on motion of the complainants, made its injunction *pendente lite*, which, with the exception of the title of Court and Cause, is in the words and figures following, to wit:

“INJUNCTION PENDENTE LITE.

“United States of America,

Northern District of California,—ss.

The President of the United States of America, to
Wm. S. Noyes, B. S. Noyes, and L. Osborn,
Their and Each of his Agents, Servants, Em-
ployees, Representatives or Attorneys, and
Each of Them, GREETING:

Whereas, on this 12th day of December, A. D. 1916, an order in the above-entitled court and suit was made, directing that an injunction *pendente lite* issue herein, and wherein and whereby it was ordered, adjudged and decreed that Wm. S. Noyes, B. S. Noyes and L. Osborn, and their and each of his agents, servants, employees, representatives or attorneys, and each of them, be enjoined and restrained from transferring [305] to any persons whomsoever all or any portion of a total aggregate of 59,544 $\frac{5}{6}$ shares of the capital stock of the Presidio Mining Company held by L. Osborn in December, 1912, pending the determination of this suit, and also that said respective parties deposit with the clerk of this court a total 59,544 $\frac{5}{6}$ shares of said capital stock;

Now, Therefore, in accordance with the terms of said order directing that an injunction *pendente lite* issue in said suit, we hereby strictly command and enjoin you, and each of you, the said Wm. S. Noyes, B. S. Noyes and L. Osborn, you and each of your agents, servants, employees, representatives or attorneys, and all persons acting in aid of you, or either or any one of you from transferring,

directly or indirectly, all or any part or portion of said aggregate number of $59,544\frac{5}{6}$ shares of the capital stock of the Presidio Mining Company, and we do hereby further strictly command and enjoin the Presidio Mining Company, its officers or agents, directly or indirectly, to refrain from transferring all or any part or portion of said $59,544\frac{5}{6}$ shares of the capital stock of said company; and we likewise hereby command that you and each of you forthwith deposit with the clerk of this court the following shares of stock now standing in the names of the following parties:

Cert. No. 131, dated Oct. 21, 1916, Wm.

S. Noyes, Pledgee of L. Osborn..25,000 shares

Cert. No. 134, dated Oct. 25, 1916,

Frank M. Parcels..... 1,000 shares

Cert. No. 135, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 136, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 137, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 138, dated Oct. 25, 1916, Wm.

S. Noyes..... 1,000 shares

Cert. No. 139, dated Oct. 25, 1916, Wm.

S. Noyes.....15,000 shares

And in addition to said 45,000 shares, that Wm. S. Noyes deposit 8,618 shares, and B. S. Noyes $5,926\frac{5}{6}$ shares, pending the determination of this suit; which commands and injunction you and each of you are respectively required to observe and obey

until other or further orders of said District Court shall be made in the premises.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 12th day of December, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and forty-first.

[Seal]

WALTER B. MALING,
Clerk.

Deputy Clerk." [306]

The trial of this cause was commenced on the 16th day of March, 1916, and said trial was concluded on the 29th day of August, 1916, and was on said day argued and submitted to the Court for decision upon briefs. That thereafter, on the 3d day of December, 1917, this Court rendered its oral opinion and decision in favor of the complainants and against these defendants. That said oral opinion was entered herein on the 12th day of February, 1918, reference to which is hereby made. That in and by said decision, this Court found that the property known as Section 5 to be in equity the property of the Presidio Mining Company, and further directed the appointment of a receiver of the corporation, the Presidio Mining Company, and of said Section 5. That in and by said opinion, this Court further directed an accounting to be taken by the Master in Chancery to ascertain the amount due from the defendants, other than the Presidio Mining Company, to said Presidio Mining Company.

That thereafter, on the 28th day of December, 1917, the defendants herein filed their petition and motion, and notice of motion, to reopen this cause; that said petition and motion was made upon all the papers, pleadings, files and proceedings in this cause, upon the evidence and testimony theretofore taken and received in this cause, upon said petition and motion, and upon the affidavits of L. Osborn, L. M. Doherty, William Osborn, R. T. Harding, James D. Ralph, John W. F. Peat and B. S. Noyes, which were attached to said petition and motion, and marked exhibits "A," "B," "C," "D," "E," "F," and "G" respectively, and made a part of and incorporated in said petition and motion as a part thereof, and are here referred to. [307]

That thereafter, on the 21st day of January, 1918, the complainants filed objections to the defendants' motion to reopen this cause, to which reference is hereby made, and also to the affidavits attached to said complainants' objections to defendants' motion to reopen this cause. That at the same time, the complainants made a motion for the appointment of a receiver herein, and that on the 21st day of January, 1918, this Court denied the defendants' motion to reopen this cause, and continued the complainants' motion for the appointment of a receiver, to January 28, 1918.

That on said 28th day of January, 1918, these defendants filed objections to the appointment of a receiver herein, which said objections, with the exception of the title of court and cause, are in the words and figures following, to wit:

“Now come the defendants and object to the appointment of a receiver herein, and for grounds of objection respectfully show to this Honorable Court:

That the appointment of a receiver is not necessary to protect the interests of the complainants or of any of the stockholders of the Presidio Mining Company under the terms of the interlocutory decree directed to be entered herein in pursuance of the oral opinion of the Court made herein on the third day of December, 1917.

In support of this contention, the defendants respectfully submit for the consideration of the Court the following facts:

That all of the relief to which the complainants are entitled under said oral opinion, against the defendants is:

- (1) A conveyance from Wm. S. Noyes to the Presidio Mining Company of Section 5.
- (2) A money judgment in favor of the Presidio Mining Company in the sum of \$63,336.20, the amount received by Wm. S. Noyes on account of Section 5, less the sum of \$24,009.33 paid by him as the purchase price of said Section 5; less also the sum of \$1,500.60 paid by him for taxes levied and assessed against [308] Section 5; and less also \$10,689.75, the amount of the Osborn shortage.

That as of the date of January 25th, 1918, the amount of the judgment to be entered against these defendants under said oral opinion, including all

moneys paid Wm. S. Noyes on account of Section 5, and also the Osborn shortage, principal and interest, aggregates the sum of \$44,798.35. This sum does not include the costs of suit and counsel fees, nor sums which may be recovered on account of alleged excessive salaries and other matters hereinafter mentioned.

That these defendants are the owners of 92,433½ shares of the capital stock of said Presidio Mining Company out of a total of 150,000 shares. In round figures, which favor the stockholders other than the defendants, 40 per cent of said judgment will be in favor of the stockholders of said company other than the defendants, and 60 per cent thereof will be in favor of the defendants themselves. Forty per cent of said sum of \$44,798.35 is the sum of \$17,919.34, the amount which the complainants and all other stockholders, other than the defendants, are entitled to recover from these defendants, as far as now ascertained by this Court. As against the sum of \$17,919.34, these defendants respectfully show that the Presidio Mining Company now has

- (1) In cash and bullion in San Francisco, the sum of \$63,912.03;
- (2) In Liberty Bonds, the sum of \$25,000.00;
- (3) Cash in Savings Bank at Marfa, Texas, the sum of \$15,000.00;
- (4) Cash in Marfa National Bank, Marfa, Texas, the sum of \$43,154.46;
- (5) Supplies on hand at the mine at Shafter, Texas, as of January 1, 1918, the sum of \$45,183.50,

making a total of net liquid assets of \$192,249.99.

That there is no indebtedness or charge against said last-mentioned sum, except the operating cost for the month of January, 1918, running at the rate of about \$800 per day, and the income tax and excess profits tax to be levied under the recent act of Congress, amounting to about \$50,000.

Defendants further state that on the assumption that Section 5 will finally be adjudged to be the property of the Presidio Mining Company, the company could now, with business prudence, declare a dividend to the stockholders dividing the sum of \$100,000; and that these defendants, as directors of the Presidio Mining Company, are ready and willing to pay into this court, in cash and Liberty Bonds, the sum of \$100,000 and to stipulate the sum of \$61,155.60, representing their equitable interest, as stockholders in the Presidio Mining Company, in said fund of \$100,000, may be held [309] by this Court as a bond to insure the payment of any money judgment which the complainants may recover, either for the benefit of the Presidio Mining Company, or for the benefit of themselves, as and for costs and counsel fees in this suit.

This will leave, in the hands of this Court, the sum of \$43,236.32, to satisfy any judgment which may be rendered herein against these defendants, or any of them, by reason of alleged excessive salaries, the Gregg & Gleim Tramway contract, boarding-house contract, wood contracts, or other like matter.

These defendants therefore contend, and respectfully represent to this Court that it is not necessary to appoint a receiver herein to insure the payment

of any final money judgment which may be entered herein against these defendants.

In regard to Section 5, these defendants state that heretofore, on the 30th day of December, 1915, this Court made an order restraining the defendant Wm. S. Noyes from transferring said Section 5, or any interest therein, or from in any manner clouding the title thereto, and also restraining these defendants from paying any money to Wm. S. Noyes on account of Section 5. That a certified copy of said restraining order has been recorded in the Recorder's office of the County of Presidio, in the State of Texas, where said property is situated.

The defendants therefore respectfully represent to this Court that it is not necessary to appoint a receiver herein to maintain the *status quo* in regard to Section 5.

As a further objection to the appointment of a receiver herein, these defendants respectfully represent to this Honorable Court that it is not true, as declared in its said oral opinion, that the income of the Presidio Mining Company has been dissipated.

In this behalf, these defendants state that on the first day of January, 1913, the total net liquid assets of the Presidio Mining Company, consisting of bullion and supplies, were in 1913 inventoried at \$38,203.38, but for which the Company realized only the sum of \$25,884 and no more. That in the five years of the administration of these defendants as directors of said corporation, the assets of said corporation have been increased in value in the sum

of \$303,402.27, and as of January 24, 1918, consisted of the following items:

Cash and bullion in San Francisco	\$63,912.03
Liberty Bonds	25,000.00
Cash in Savings Bank, Marfa, Texas . .	15,000.00
Cash in Marfa National Bank, Marfa, Texas	43,154.46
Mining Supplies at Shafter, Texas	45,183.50
Permanent equipment since Jan. 1, 1913	157,036.28
<hr/>	
Total	\$349,286.27

[310]

That an itemized statement of the permanent equipment is hereto attached, marked exhibit "A" and made a part hereof.

That on the assumption that Section 5 will finally be adjudged to be the property of the Presidio Mining Company, said corporation is free from all indebtedness, and that there is now no charge against the aforesaid assets, except the current operating expenses of about \$800 per day for the month of January, 1918, and the income and war tax hereinabove mentioned.

That the above-mentioned increase in assets has been the result of the mining operations carried on by these defendants as directors of said corporation, without calling upon the stockholders to contribute one cent through assessment or otherwise.

These defendants further represent that the appointment of a receiver is unjustified, because there is no controversy here that these defendants have mismanaged the mining affairs of said corporation,

or that they have not conducted those affairs of said corporation as economically as possible; but on the contrary, the entire controversy has involved the ownership of Section 5, and the question whether the salaries of some of the defendants were too high. In regard to the management of the mining properties of the corporation, these complainants make the following admission in their original bill of complaint, on page 11, lines 7 to 13 thereof:

‘that on or about March 24, 1915, said W. S. Overton interviewed L. Osborn and Wm. S. Noyes, Secretary and General Manager, respectively, of said corporation; that thereafter on his way back East, said W. S. Overton stopped at the said Presidio Mine in Texas, and then and there first noticed the excellent equipment of said plant and the organization and efficiency of the employees and the operations of said mine and mill’;

These defendants state that the complainants omitted said admission from their amended bill of complaint, realizing that the same was fatal to their design to throw the company into the hands of a receiver; but on the trial of said cause no evidence was attempted to be offered by them to in anywise contradict the aforesaid admission.

These defendants further state that no better showing can be made by any mining corporation operating under similar environments in the United States.

That there is serious danger to the welfare of the Presidio Mining Company in placing the mining

operations in the hands of a stranger, no matter how capable such person may be, for the following reasons:

- (1) The mine possesses peculiar geological conditions, [311] a knowledge of which can only be obtained by long experience in that mine;
- (2) The mine and mill are in an isolated position, in a barren country 45 miles from railroad and only 15 miles from the Mexican border;
- (3) An intimate knowledge of the conditions and temper of the Mexican workmen and residents is necessary to the safety of life and property;
- (4) The hauling of oil and other supplies has always been a source of trouble, owing to the fact that there is a scarcity of teams and trucks in the surrounding country and in the case of emergency freight, long acquaintance and friendly relations are necessary in order to procure the service when needed.

Respectfully submitted,

R. T. HARDING and

HENRY E. MONROE,

Solicitors for Said Defendants.

J. J. DUNNE,

Of Counsel.

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

B. S. Noyes, being first duly sworn, on oath deposes and says: That he is one of the defendants in the above and within entitled action; that he has read

the foregoing defendants' objections to the appointment of a receiver and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true.

B. S. NOYES.

Subscribed and sworn to before me this 28th day of January, A. D. 1918.

[Notarial Seal]

M. A. BRUSIE,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A" TO THE DEFENDANTS' OBJECTIONS TO THE APPOINTMENT OF A RECEIVER.

PERMANENT IMPROVEMENTS

Installed at the PRESIDIO MINE Between Jan. 1, 1913 and Dec. 31, 1917.

1913.

Cyanide Plant Cost.....	\$33,582.39	
Surface Tracks	7,359.25	\$40,941.64

[312]

1914.

Rope Tramway	\$24,772.04
New Crusher at Mine.....	770.00
Water System at Mine....	1,178.58
100 H. P. De La Vergne	
Engine at Mill.....	9,772.62
Electrically Driven Pump	
Installation	1,855.93

Machine-shop	1,872.17	
Extra Zinc Box in Mill....	360.00	
Friction Clutches for Tube		
Mills	454.30	
Vacuum Pump for Filter..	461.73	
Extra Elevator in Mill....	596.80	\$42,094.17

1915.

1 Electric Generator, no amount....		
1 12x12 Air-compressor, no amount..		
3 New Classifiers, no amount.....		9,683.00
Alterators to Tube Mill Bearing Fil-		
ter Pumps and Old Air Compressor		
(Annual Report 1915, page 5)		
(All in the Mill)		

1916.

Large Steel Plate Jaw		
Crusher, 1 30 H. P. Oil		
Engine (Mine).....	3,500.00	
New Zinc Box, Large Melt-		
ing Furnace		
Machine Tools in Machine-		
shop (Mill)	2,200.00	5,700.00

1917.

MINE.

Oil Engines in Power-		
house	\$23,985.82	
Power-house Belting..	4,882.92	
Drill Sharpening Ma-		
chine, Forge, Belting	2,114.88	
Electrical Apparatus,		
Mine Power House.	3,977.33	

Air-compressor, Mine		
Power-house	2,459.82	
Water Cooling Plant..	2,397.16	
Auxiliary Equipment,		
Mine Power-house ..	7,265.68	
Oil-Storage House.....	1,058.46	
New Hoist at South		
Shaft	2,986.80	
MILL.		
Additional Quarters for		
Employees and Garage	3,112.64	
Oliver Filter	4,375.96	58,617.47
		<hr/>
		\$157,036.28''

[313]

That complainants filed an answer to defendants' objections to the appointment of a receiver, on the 1st day of February, 1918, reference to which is hereby made, and wherein said complainants contended that defendants' said objections were misleading, and claiming that of said sum of \$192,249.99 set forth in defendants' objections to the appointment of a receiver as assets of the defendant Presidio Mining Company, at least \$35,000, or one month's expenses were to be deducted, and that \$50,000 and upwards for income tax would have to be deducted. That to the answer of complainants to defendants' objections to the appointment of a receiver, were attached the affidavit of W. S. Overton, and fifteen exhibits to said affidavit, reference to which is here made.

That thereafter, on the 16th day of February, 1918, this Court duly gave and made its interlocutory decree herein in pursuance of said oral opinion, and on the 20th day of February, 1918, duly gave and made its further interlocutory order or decree appointing a receiver herein, which said Order appointing said Receiver is, with the exception of the title of Court and cause, in the words and figures following, to wit:

“Complainants’ motion for appointment of a receiver having been heretofore heard and submitted, and it appearing that special reasons exist why Walter B. Maling, Clerk of the above-entitled District Court, be appointed Receiver herein, to wit: That the respective complainants and defendants have agreed, pursuant to their stipulation heretofore filed herein, and have requested that he be appointed; it further appearing that said respective complainants and defendants have not reached any agreement for the appointment of any other person to serve as receiver; that the appointment of said Walter B. Maling will not interfere with his duties in office as clerk of this court; that he is familiar with the facts in this suit and is well qualified and competent to serve, and that it will be for the benefit of all parties that he act as such receiver;

Now, therefore, said special reasons existing, and [314] good cause appearing therefor, IT IS HEREBY ORDERED:

1. That Walter B. Maling be and he is hereby appointed Receiver of Presidio Mining Company, including the Presidio Mine, known as Section 8,

Presidio County, State of Texas, and Section 5, adjoining said Section 8, together with the Presidio mill, and all improvements, appurtenances and equipment connected with said Sections 8 and 5, and all the real and personal property of said corporation of every kind and nature wherever situated, with full power to act in all particulars in the place and stead of the directors and officers of said corporation, pursuant to law in such cases made and provided, and after proper ancillary proceedings have been had where and when the same shall be required.

Said Receiver is hereby authorized and directed to take immediate and exclusive possession of said Presidio Mining Company, its office, Room 209, 255 California Street, San Francisco, California, its assets, books, records and papers, to continue, control, carry on and conduct its business in all its ramifications, including the mining, milling, handling its ores, selling its bullion, and to discharge the duties obligatory on said corporation;

2. IT IS FURTHER ORDERED That said Receiver be and he is hereby authorized and directed to operate said Presidio Mine in and on Section 8, and Section 5, the milling and reduction plant of said corporation, and manage said properties in such a manner as will in his judgment produce the most satisfactory results consistent with the discharge of the duties imposed thereon; to collect and receive all the income therefrom, and for such purpose is hereby invested with full power in his discretion to employ, discharge, fix compensation of any

and all agents, attorneys, managers, superintendents and employees as may be necessary to aid in the discharge of his duties.

Said Receiver is fully authorized and empowered to make such investigations, institute and prosecute such suit, as may be necessary in his judgment for the recovery of moneys or other assets belonging to said corporation, or for the proper protection of the said properties and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such Receiver, the prosecution or defense of which in his judgment will be necessary for the proper protection of the said property placed in his charge, or benefit, or increase the assets of said corporation. He is further empowered to take any and all steps by ancillary or other legal proceedings required by law in the proper courts and jurisdictions to obtain full and complete authority to carry out the orders and provisions herein contained.

3. IT IS FURTHER ORDERED: That the defendants, their and each of their agents, directors officers, servants, representatives, the employees of Presidio Mining Company, and all other persons, be and the same are hereby required and commanded to turn over and deliver to such Receiver or his duly constituted representatives any and all property real or personal, or held in trust, belonging to said corporation, [315] and also Section 5, including books, records and papers of said corporation; said B. S. Noyes and Wm. S. Noyes are likewise ordered to turn over any and all books, records, documents and papers in their possession or under their con-

trol, pertaining to the business of said Presidio Mining Company or Section 5; and each, every and all such directors, officers, agents, employees or persons are hereby commanded and required to obey and conform to such orders as may be given to them from time to time by such Receiver or his duly constituted representatives in conducting the operations of said Presidio Mining Company, its properties, Section 5, and in discharging his duties as such Receiver.

Said defendants, their, and each of their agents, or representatives, and all other persons are hereby restrained and enjoined from interfering in any manner whatever with the possession or management or operation of any part of the said properties over which said Receiver is hereby appointed, or interfering in any manner to prevent the discharge of his duties under this order.

4. IT IS FURTHER ORDERED: That said Receiver continue in office pursuant to the terms and under the conditions herein mentioned, until the final termination of this suit, or until otherwise ordered by this Court.

5. IT IS FURTHER ORDERED: That said Receiver, within the next thirty days file with the clerk of this Court a proper undertaking with satisfactory sureties, to be approved by this Court, in the sum of Ten Thousand Dollars, conditioned for the faithful discharge of his duties, and to account for all the funds coming into his hands, according to the order of this Court.

Dated February 20th, 1918.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 20, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk."

That thereafter, these defendants and each and all of them, appealed to the United States Circuit Court of Appeals in and for the Ninth Circuit, from said Interlocutory Decree and from said interlocutory order or decree appointing a Receiver herein. That in due course said appeal was perfected and was argued and submitted upon briefs to the said United States Circuit Court of Appeals, and that thereafter, on the 27th day of October, 1919, the said Circuit Court of Appeals duly rendered [316] its decision in this case, reversing in part, and affirming in part, the interlocutory decree of this Court, and reversing in full the interlocutory order or decree appointing a Receiver herein, and discharging the interlocutory injunctions theretofore given and made by this Court.

That in pursuance of said opinion of said Circuit Court of Appeals, and on the 27th day of October, 1919, the judgment or decree of said Circuit Court of Appeals was duly entered, which, with the exception of the title of Court and cause, is in the words and figures following, to wit:

"DECREE U. S. CIRCUIT COURT OF AP-
PEALS.

Appeal from the Southern Division of the District
Court for the Northern District of California,
Second Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern Division of California, Second Division, and was duly submitted:

On consideration whereof, it is now here ORDERED, ADJUDGED AND DECREED by this Court, that that part of the interlocutory decree of the said District Court providing:

‘That in and by said final decree the said William S. Noyes shall be ordered and directed within thirty (30) days from the date thereof to transfer said Section 5 to said Presidio Mining Company by proper deed free and clear of all liens and encumbrances.’

will stand affirmed.

That part of the said decree relating to the payment of the purchase price of the property to William S. Noyes providing:

‘That said William S. Noyes be credited with the purchase price of Section 5, together with interest thereon at the rate of seven per cent per annum from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of seven per cent per annum from the date of payments’ will stand affirmed. [317]

That part of said decree will run against the Presidio Mining Company and its officers and directors and will be as of the date of February 16,

1918. The amount due thereon to be ascertained by a reference to the accountants Klink, Bean & Co.

The final decree will also provide for the payment to William S. Noyes the amount due him under the lease of November 19, 1913, from January 25, 1913, to February 16, 1918. The amount to be ascertained by a reference to the accountants Klink, Bean & Co., with direction to extend and complete their schedules as they appear in the record and are there numbered, 4, 5, 6, 7, 8, and 9, so as to include in like manner, but in a condensed form, all royalties due and payable to William S. Noyes for the years 1916, 1917, down to February 16, 1918.

In this computation Wm. S. Noyes will be charged with \$3,500, which we find was in effect paid to him on September 6, 1913, and was applied by his direction to make good a further shortage in the accounts of L. Osborn. This amount is included in the statement made by Noyes that up to December 31, 1915, he had received \$63,336.20. To the amount thus found due William S. Noyes under the lease of November 19, 1913, will be added the amount found due him on the purchase price of Section 5, and for the full sum so found due him the final decree will run against the Presidio Mining Company, its officers and directors. The said interlocutory decree of the said District Court in all other respects not herein mentioned will be reversed and set aside, the interlocutory injunction dissolved and the receiver discharged. The plaintiffs and defendants will each pay their own costs in this court."

[Endorsed]: Decree. Filed and entered October 27, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk."

That the opinion of said Circuit Court, of Appeals, upon which said judgment is based, is reported in Volume 261 of the Federal Reporter, at page 933, to which reference is here made.

That thereafter, upon the petition of the complainants, a rehearing of this cause was granted in the said Circuit Court of Appeals, and that thereafter, said cause was reargued and resubmitted upon briefs, and that thereafter, on the 17th day of January, 1921, said Circuit Court of Appeals duly rendered its decision in this cause, reaffirming its former opinion and judgment, and again reversing in part and affirming in part, [318] the interlocutory decree of this Court, and reversing in whole the interlocutory order or decree appointing a receiver herein, and discharging the interlocutory injunctions heretofore given and made by this Court. That thereafter, and on the same day and in pursuance of said last-mentioned opinion of said Circuit Court of Appeals, the judgment or decree of said Circuit Court of Appeals was duly entered, which, with the exception of title of Court and cause, is in the words and figures following, to wit:

"Our former judgment (261 Fed. 933-965) is reaffirmed and will be re-entered as follows:

"That part of the interlocutory decree providing that in and by said final decree the said William S. Noyes shall be ordered and directed within 30 days from the date thereof to transfer said Section 5

to said Presidio Mining Company by proper deed free and clear of all liens and encumbrances' will stand affirmed.

That part of the decree relating to the payment of the purchase price of the property to William S. Noyes, providing, 'that said William S. Noyes be credited with the purchase price of Section 5, together with interest thereon at the rate of 7 per cent per annum from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of 7 per cent per annum from the date of payments,' will stand affirmed.

That part of the decree will run against the Presidio Mining Company and its officers and directors, and will be as of the date of February 16, 1918; the amount due thereon to be ascertained by a reference to the accountants, Klink, Bean & Co.

The final decree will also provide for the payment to William S. Noyes of the amount due him under the lease of November 19, 1913, from January 25, 1913, to February 16, 1918; the amount to be ascertained by a reference to the accountants, Klink, Bean & Co. with direction to extend and complete their schedules as they appear in the record and are there numbered 4, 5, 6, 7, 8, and 9, so as to include in like manner, but in a condensed form, all royalties due and payable to William S. Noyes for the years 1916, 1917, and down to February 16, 1918.

In this computation Wm. S. Noyes will be charged with \$3,500, which we find was in effect paid to him

on September 6, 1913, and was applied by his direction to make good another shortage in the accounts of L. Osborn. This amount is included in the statement made by Noyes that up to December 31, 1915, he had received \$63,336.20. To the amount thus found due William S. Noyes under the lease of November 19, 1913, will be added the amount found due him on the purchase price of Section 5, and for the full sum so found due him the final decree will run against [319] the Presidio Mining Company, its officers, and directors.

The interlocutory decree in all other respects not herein mentioned will be reversed and set aside, the interlocutory injunction dissolved, and the receiver discharged. The plaintiffs and defendants will each pay their own costs in this court."

That thereafter, said complainants in this cause filed their petition in the Supreme Court of the United States, for a writ of *certiorari* to the U. S. Circuit Court of Appeals of the Ninth Circuit, but that said petition was denied by the Supreme Court of the United States, and that thereupon a mandate in this cause issued out of the said U. S. Circuit Court of Appeals, which said mandate was and is in the words of the aforesaid judgment entered in said Circuit Court of Appeals.

That the opinion rendered by said Circuit Court of Appeals herein upon the rehearing of said cause, is reported in Volume 270 of the Federal Reporter, at page 388, and that reference thereto is here made. That in reference to the objections of these defendants to the appointment of a Receiver herein, which

are hereinabove set forth, commencing with line 11 on page 29, down to and including line 28 on page 34, the said Circuit Court of Appeals in its said opinion upon rehearing herein makes the following statement and findings, to wit:

“There is an order in the decree appointing a receiver to take possession of all the property of the corporation including Section 5 and operate the same in all its departments and ramifications as a mining and milling property. The corporation was not insolvent nor in any danger of insolvency, but was a going concern in a high state of efficiency as shown by defendants’ objections to the appointment of a receiver, and the accompanying statement filed January 28, 1918, summarized as follows:

The total liquid assets of the Presidio Mining Company, consisting of bullion and supplies, were in 1913 invoiced at \$38,203.28, but for which the company realized \$25,884.

On August 28, 1916, three years after the new plant had commenced operations (with the exception of the tramway) the [320] company had on hand the following:

1. The cyanide plant all paid for	\$ 79,359.03
2. Mining supplies at Shafter	30,627.78
3. Bullion in transit	3,600.00
4. Bullion at the Selby Refinery	11,167.75
5. Cash in San Francisco	7,741.97
6. Cash at Shafter	32,438.94
<hr/>	
Total	\$164,935.47

And all this was accomplished by Noyes upon his own credit, without the levying of a single assessment upon the stockholders.

In the five years of the defendants' administration of the property as directors of the corporation, the assets of the complainants had increased in value to the sum of \$349,285.27 as of the date of January 24, 1918, consisting of the following items:

Cash and Bullion in San Francisco	\$ 63,912.03
Liberty bonds	25,000.00
Cash in Savings Bank, Marfa, Texas . .	15,000.00
Mining Supplies at Shafter, Texas	45,183.50
Permanent equipment since Jan. 1, 1913	157,036.28

Total	\$349,286.27
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Deduct from this amount the sum due

Wm. S. Noyes for his one-half of the net proceeds under the terms of the lease of November 19, 1913, estimated as of the date above at	\$110,000.00
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\$239,286.27

The complainants' only answer to the first mentioned statement is the assertion that all the alleged assets mentioned in the defendants' objection were on hand because of the injunction granted in the suit and the vigilance of the complainants in guarding the company's welfare. This statement is unsupported by any evidence in the record. The injunction *pendente lite* was issued December 12, 1916, after the property had been operating under the management of Wm. S. Noyes for nearly four

years under the leases of January 25, 1913, and November 19, 1913. During this time at least four-fifths of the assets of the company were accumulated; but assuming that this answer is in some degree true, it was not alleged that the injunction was to be dissolved or that the alleged vigilance of the complainants in guarding the company's welfare was to be withdrawn. On the contrary, the objection to the appointment of a receiver was based upon the assumption that the injunction was to be continued and that Section 5 would finally be adjudged to be the property of the Presidio Mining Company with a decree for its conveyance to the company. On that assumption defendants urged as a ground for their opposition to the appointment of a receiver that—

‘Defendants further state that on the assumption that Section 5 will finally be adjudged to be the property of the Presidio Mining Company, the company could now, with business prudence, declare a dividend to the stockholders dividing the sum of \$100,000; and that these defendants, as directors of the Presidio Mining Company, are ready and willing to pay into this court, [321] in cash and Liberty Bonds the sum of \$100,000 and to stipulate the sum of \$61,155.60, representing their equitable interests, as stockholders in the Presidio Mining Company in said fund of \$100,000, may be held by this court as a bond to insure the payment of any money judgment which the complainants may recover, either for the benefit of the Presi-

dio Mining Company, or for the benefit of themselves as and for costs and counsel fees in this suit.'

Why was not this offer sufficient security for any decree that might be entered in the case?

There is incidentally another objection to defendants' opposition to the appointment of a receiver in the statement of the assets of the corporation. It is alleged by the complainants that these assets were subject to deductions, among others, that there must be a deduction of \$50,000 and upwards for income taxes. If, as is here asserted by the complainants, the corporation was liable for at least \$50,000 income taxes for the preceding year under the federal income tax law, then there must have been a net income of considerable proportion to call for such a tax. This item alone would seem to be sufficient to establish the fact that the Presidio Mining Company, when the appointment of a receiver was applied for, was a going concern of considerable efficiency engaged in profitable mining operations under the Noyes management.

As Wm. S. Noyes had been ready and willing at all times since he had become the owner of Section 5 on May 26, 1913, to convey it to the Presidio Mining Company upon the payment of the purchase price, it is difficult to see what substantial or equitable matter remained for a decree in equity to operate upon. There is nothing in the evidence calling for a decree in accordance with the amended prayer to the amended bill of complaint that a receiver be appointed to take charge of all the affairs and

business of the company authorizing him to sell the entire property and assets of the corporation, wind up its affairs, including Section 5, prohibit Wm. S. Noyes and the other defendants from in any way participating in the sale, either directly or indirectly, and from having anything further to do with said Section 8 and Section 5 and with the affairs of the corporation.

We find nothing which justifies any decree other than a decree for conveyance of Section 5 by Noyes to the company upon payment of the purchase price in accordance with his offer.” [322]

These defendants further represent to this Honorable Court that the complainants did not act in good faith in seeking the appointment of said Receiver, but that they, and in particular the complainant W. S. Overton, prosecuted this cause and sought the appointment of said receiver from selfish motives, as is disclosed in the letter from W. S. Overton to Mr. Gleim, Superintendent of the Presidio Mining Company, set forth on page 399 in Volume 270 of the Federal Reporter, in which Mr. Overton says to Mr. Gleim:

“If I ever control the management here I pledge you my word I shall put no spy on you; I wouldn’t insult a man so.”

In regard to this letter, the Circuit Court of Appeals has the following to say, on pages 399–400 of said Federal Reporter, namely:

“The defendants contend that this letter discloses the fact that the real purpose of this suit and the only purpose was to enable Capt. Over-

ton to secure control and management of the company in his own hands and not to serve the interests of the minority or other stockholders in the corporation. In support of this contention the defendants point to the silence of the minority stockholders in this action—they have not asked to be made parties to it—the extraordinary character of the charges of conspiracy and fraud contained in the original and amended bills, and the prayers for relief attached to each. The temporary injunction issued against Noyes restraining him from receiving any money from the company on account of Section 5 and against transferring any title thereto; the amended prayer to the amended bill demanding the removal of all the directors and officers of the company; a sweeping injunction against all their acts as officers of the company; the appointment of a receiver to take charge of all the affairs and business of the company, authorizing him to sell the entire property and assets of the Presidio Mining Company, wind up the affairs of the corporation, including Section 5, prohibiting Wm. S. Noyes and the other defendants from in any way participating in said sale directly or indirectly or from having anything further to do with said Section 8 or Section 5 or with the affairs of the corporation.

This prayer for relief and Capt. Overton's letter to Gleim dated July 29, 1915, appear to have the same object in view, namely, to oust

Wm. S. Noyes and his codefendants from the corporation and deprive them from any further connection with it or interest in its affairs.”

[323]

Our contention in this regard is further confirmed by the following quotation from page 13 of the complainants' brief and petition for a writ of *certiorari* filed by them in the Supreme Court of the United States, and directed to the U. S. Circuit Court of Appeals for the Ninth Circuit, in this cause. They there say that:

“That the issue tendered, and thus reserved for further consideration, was that these frauds by the board of directors, general manager and majority stockholders, placed the corporation in such a position that equity could be done the minority stockholders only by winding up the affairs of the corporation and distributing its assets to all of the stockholders; that ancillary relief was granted first on December 31, 1915, in the form of an injunction prohibiting further payments of money to William S. Noyes, the Superintendent and general manager, under the last contract, and later after the trial, a receiver *pendente lite* was appointed to take over the management of the affairs of the corporation.”

These defendants further state that the total amount of the items excepted and objected to in the foregoing four accounts of said receiver, is the sum of \$57,730.06.

WHEREFORE, these defendants pray that their objections and exceptions to said account of said receiver may be sustained, and the aforesaid items, and each and every one of them, so objected to, be disallowed, by this Honorable Court, and that these defendants may have such other, further, different, and/or additional relief in the premises as may be proper.

Respectfully submitted,

R. T. HARDING,

HENRY E. MONROE,

Solicitors for said Defendants.

J. J. DUNNE,

Of Counsel. [324]

State of California,

City and County of San Francisco,—ss.

B. S. Noyes, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing objections to the above-mentioned items in the Receiver's report herein, and that he has read "Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver," and knows the contents thereof; and that the same are true of his knowledge, except as to the matters therein stated on information and belief, and that as to those matters, he believes it to be true.

B. S. NOYES.

**Complainants' Answer to Defendants' Exceptions
and Objections to Fourth and Final Report
and Account of Receiver.**

Now come complainants above named and answering the defendants' exceptions and objections to the fourth and final report and account of Receiver, allege:

I.

That by said so-called exceptions and objections, defendants seek to impose costs upon complainants for the receivership expenses without making a motion to tax costs; that said attempt to so tax costs is premature.

II.

Complainants aver that all motions for injunctions and Receiver were made in good faith and on facts which warranted said action at the time when taken; that proper diversity of citizenship exists, and the Court had and has jurisdiction of the parties and subject matter of this suit; that complainants hereby refer to all their motions and applications heretofore filed in this action for injunctions [326] and a receivership, and supporting affidavits, original and supplemental, the files and records appertaining thereto, and by said reference make the same a part hereof as fully as though here set out in full, specifically reserving their right to refer to said files and records herein in any and all appeals or other proceedings which may hereafter be taken herein by either or any of the parties in this suit.

III.

That complainants' original motion for the appointment of a Receiver and injunctive relief, after the filing of amended complaint herein, was filed on or about October 5, 1915, and was based upon affidavits of W. S. Overton, dated July 26th and 27th, 1915, supplemented by his affidavit of October 6th, 1915, and the supplemental affidavits of Frank H. Gardiner, dated December 4, 1915, and J. E. Herger, dated December 6th, 1915, and the reply affidavits thereto; that after full hearing, argument, and submission of said matter, and the facts appearing therein having been duly considered by the Court, injunctive relief was granted, but the receivership denied; that in this connection complainants aver that the ruling of Judge Dooling on the original complaint was made by him because of the absence of the regular Judge from Division No. 2; that the order of said Judge Dooling specifically grants to plaintiffs the right to renew the application for injunctive relief and for a Receiver, and the filing of an amended complaint; that said matter was not again considered by Judge Dooling for the reason that after the filing of the amended complaint the regular Judge was again sitting in Division No. 2; that the said Judge originally hearing the case would have had full jurisdiction and power to again hear [327] the matter had it been brought before him in the regular course of procedure.

IV.

That on or about February 11, 1916, on motion therefor, an order was made permitting inspection

of records, books and documents and the examination of Thiel Detective reports which order was made because defendants controlling the Presidio Mining Company refused to permit complainants access to all the books, records and files of and belonging to the corporation; that the said motion and affidavits, and order of February 11th and all the documents, records and files relative thereto are hereby referred to and by said reference made a part thereof as fully as though here set out in full, complainants hereby reserving their rights to use any and all said documents in any future proceedings upon appeal or otherwise.

That after the submission of this case August 29, 1916, and, to wit, on or about October 21st, 1916, the Noyes Brothers commenced to transfer shares, which had been originally held by L. Osborn and subsequently placed in a voting trust, to third parties; that immediately thereon complainants filed their motion and affidavits to restrain all defendants from transferring any of their shares to third parties in order to enable complainants to enforce any judgment which might be secured in the premises; that it was and is the belief of complainants that transfers were about to be made to remove the original Osborn holdings from the control of the Court and evade enforcement of judgment against him; that on giving proper security, a temporary restraining order was issued by the Honorable Benjamin F. Bledsoe on October 27th; that thereafter on argument in open court and a submission of all the facts, and in consideration of the law in the prem-

ises, an injunction, dated [328] December 12, 1916, was duly ordered, given and issued on the furnishing of a \$2,500.00 bond by complainants, commanding the defendants to refrain from in any way transferring the stock described in said injunction and compelling them to deposit the same with the Clerk of this court, but only to the extent of the 59,544 $\frac{5}{6}$ shares designated as the original Osborn holdings and which were being split up and transferred to other parties; that all the motions, affidavits, files and proceedings relative to said injunction are hereby referred to and by said reference made a part hereof as fully as though here set out in full, complainants reserving the right to use said documents on appeal or otherwise hereafter.

V.

That after the decision in this case on December 3, 1917, and the announcement by the Court that a Receiver would be appointed, which said Receiver was appointed on February 20, 1918, over the objection of defendants, at no time after said appointment did defendants ever make a motion to discharge the Receiver or attempt to remove him from office by the filing of a supersedeas bond, nor did they or any one of them take any steps whatsoever to cause the Receiver's removal from office by any of the methods provided by law, but failed, neglected and refused so to do.

That at the time of the appointment of said Receiver the facts of said case had disclosed that L. Osborn had embezzled the corporate funds and his embezzlements had been concealed by all the in-

dividual defendants, as directors and officers, from stockholders of the corporation, other than themselves; that said Osborn had been paid a salary while stealing the corporate funds; that when about to be arrested he had been incarcerated in Agnew State Hospital apparently in order to [329] prevent his being punished for his crimes; that the Assistant Secretary Peat, had been receiving a salary as such without rendering any service whatsoever to the company; that both of said last-named parties as directors had been giving their votes to carry out the contracts made by W. S. Noyes relative to Section 5 through his control of the company directorate of which he was one; that said W. S. Noyes had acquired Section 5 while the confidential and fiduciary agent of the Presidio Mining Company in full charge of its property and alone knowing the full facts and value of said Section 5 other than possibly E. M. Gleim under his control as superintendent at the mine; that said Noyes had given promissory notes to pay for section 5, which he had acquired for Twenty-four Thousand Nine and 33/100 (\$24,009.33) Dollars and then in the control of said section 5 as owner had contracted with himself on the one hand, and with the Presidio Mining Company which he likewise controlled on the other hand, for the payment of fifty (50) cents a ton royalty on ores taken from Section 5, a Forty-five Thousand (\$45,000.00) Dollar bonus to be paid him for obtaining said lease with himself, and subsequently a fifty-fifty contract on ores extracted from Section 5 with a differential of one (\$1.00) dollar

per ton in his favor after the title had been transferred from the Silver Hill Mill and Mining Co. to his own name; that by reason of the contracts so made while controlling the Presidio Mining Company on the one hand and having secured the title to Section 5 in himself while a fiduciary on the other, and the trial Court having found that section 5 belonged to the corporation and directed him to transfer Section 5 to the Presidio Mining Company, it was within the sound discretion of the Court to appoint a Receiver in order to protect the stockholders of the corporation against manipulations of the [330] property which was controlled by said W. S. Noyes and who with his associates, was causing the corporation in their control to resist the recovery of Section 5 for itself and for the benefit of all its stockholders.

VI.

Referring to the costs and expenses of said Receiver, these complainants aver that the receiver conducted operations economically and accumulated approximately Five Hundred Thousand (\$500,000) Dollars in cash, securities and bullion in transit during its receivership, paid United States Income taxes of One Hundred and Eighty-two Thousand, Five Hundred and Twenty-two and $23/100$ (\$182,522.23) Dollars in addition to making improvements on the property aggregating about Forty-three Thousand Nine Hundred and Sixty-six and $77/100$ (\$43,966.77) Dollars; that the said receiver turned over to the officials of this company on or about May 7, 1921, Six Hundred and Nineteen Thousand Three

Hundred and Ten and 74/100 (\$619,310.74) Dollars in cash, securities and bullion in transit; that he produced silver at no higher cost per ton than did defendants themselves although labor and materials greatly increased in price; that in 1920 the actual cash cost per ton of ore mined and milled was thirty-nine (39) cents less than in 1917, the year prior to the receivership; that by agreement of the parties he also worked lower grade ores than otherwise might have been worked, thereby not increasing the earnings of the corporation as much as he might have done.

That the complainants approved this course is evidenced by their communications of July 31st and August 24th, 1918, answering the Receiver's suggestion in his communication dated July 29th suggesting that lower grade ores be worked, which [331] information was also communicated to defendants; that after the milling of lower grade ore had been decided on, W. S. Noyes September 2, 1921, sent a commission to the Receiver suggesting this course. That copies of said communications are attached hereto marked exhibits "A," "B," "C" and "D" here referred to and by said reference made a part hereof as fully as though here set out in full.

That during the last year of the receivership the interest alone from invested money in the hands of the Receiver more than paid the cost of receivership during said time, whereas under defendants' management up to the end of December, 1915, nearly six months after the commencement of this suit, when an injunction was granted by the trial

Court, restraining defendants from drawing any further moneys under the bonus and leases to Wm. S. Noyes, defendants paid from the company treasury constant charges for interest, which in 1915 alone amounted to over \$1900. That during the same year, 1915, said corporation paid to W. S. Noyes \$12,025.75 in addition to his salary. That only after the granting of this injunction, December 30, 1915, was the company able to accumulate sufficient cash to avoid being forced to resort to interest payments on bank overdrafts and advances from the Selby Smelter, which last named made two such advances as late as December 9th and 21st, 1915. That when this litigation was initiated, July 26, 1915, said corporation was indebted in the sum of approximately Eighty Thousand (\$80,000.00) Dollars.

That said W. S. Noyes on September 12, 1919, writing to the Receiver relative to certain pillars in the mine, stated:

“This information will be as desirable for you as for all the stockholders, for the reason that if the information above referred to is founded on fact, both you and the stockholders [332] should know it; but if, on the contrary, that information shall prove to be without foundation, as I hope it may, the stockholders will be relieved of any possible fear of menace to their property, and the *last word of encomium* of your administration, which has *been in all other respects beyond* criticism, will have been spoken.”

That said entire letter and reply thereto are attached hereto marked exhibits "E" and "F," here referred to and by said reference made a part hereof as fully as though here set out in full.

That the Receiver was greatly hampered in endeavoring to operate the Presidio Mine during the fall and winter of 1918 and 1919. That for cause he demanded the resignation of E. M. Gleim, the superintendent at the mine under W. S. Noyes, December 1st, 1918. That immediately at, during and after, the period when said resignation was demanded and received, attempt was made to close down the mine through the activities of said E. M. Gleim, and James Sloan, the mine forman. That a copy of the report sent to the Receiver and referring to existing conditions is attached hereto marked exhibit "J" here referred to and by said reference made a part hereof as fully as though here set out in full. That notwithstanding said attempts to embarrass the Receiver the mine and mill were operated and not closed down. That immediately on relinquishment of control by the Receiver, the said Gleim and Sloan, and most of the others leaving the Company employ during this period in 1918, were reinstated in their former positions, and practically all the white employees engaged by the receiver discharged the same evening control was obtained by defendants, irrespective of, and disregarding, the efforts of said former employees to compel the cessation of mining and milling operations to the detriment and damage of the stockholders, had such efforts [333] been successful.

VII.

Referring to the accounting before the Master in Chancery:

Complainants aver that no stay of proceedings on appeal through the filing of a supersedeas bond was sought by defendants; that the hearing before the Master in Chancery proceeded in accordance with the order and decree of this Court; that the said hearing resulted in disclosure of facts showing that W. S. Noyes had received secret side profits directly from business dealings had between the corporation and Benton Bowers, and indirectly through dealings had between company employees and the Gleim Store, which received the miner's wages through arrangements made with Noyes for which W. S. Noyes received four (4%) or five (5%) per cent from the Gleim Store at one time, then one hundred (\$100.00) dollars per month; and in secret side profits made from the mine boarding house, without knowledge of his principal, the Presidio Mining Company; that abstracts of testimony touching these matters are attached hereto marked exhibits "G," "H," "I," here referred to and by said reference made a part hereof as fully as though here set out in full. It likewise disclosed that the Osborn shortages were Fifteen Thousand (\$15,000) Dollars as referred to on pages 30, 31 and 32 of said Master's report; that said report together with all the testimony and proceedings on said accounting, are here referred to, and by said reference made a part hereof as fully as though here set out in full, complainants reserving the right to refer thereto on any

proceedings on appeal or otherwise hereafter had herein; that all of said information so elicited in the hearings before the Master in Chancery is of [334] great value to all the stockholders of Presidio Mining Company in their endeavors to secure redress for any and all wrongful acts done by its officers, and for any derelictions of their duties.

VIII.

Referring to Haskins and Sells, Accountants:

Complainants aver that said accountants were duly engaged after hearings in this court, in order to check up books and records which were not thoroughly checked prior to said time; that said Haskins and Sells, discovered further irregularities in the Company's affairs, amounting to Ten Thousand Five Hundred and Thirty-one and $71/100$ (\$10,531.71) Dollars, as set forth on page 6 of their report; that said irregularities arose out of shipments unaccounted for, of scrap iron and lead ore, and on which hauling or loading charges were paid from the company treasury. Said accountants' report also discloses that the Osborn shortage was Fifteen Thousand Two Hundred and Seven (\$15,207) Dollars instead of Ten Thousand Six Hundred and Eighty-nine and $75/100$ (\$10,689.75) Dollars admitted by the defendants after discovery by complainant Overton; that in addition thereto said accountants assisted in preparing income tax returns for the receiver and their compensation was fair and reasonable; that all of the information made available by said audit is of great value to all of the stockholders of the Presidio Mining Company

and discloses true facts in the company affairs, which otherwise would not have been made available to said stockholders; that the appointment of said accountants was not resisted by the defendants but was tacitly acquiesced in by them through their counsel; and the appointment was within the sound discretion of the court and approval [335] of payment of said moneys to said accountants by the receiver is likewise within the sound discretion of the Court; that all of said proceedings and orders herein, and said accountants' report, are here referred to and by said reference made a part hereof as fully as though here set out in full, complainants reserving their right to use the same or any portion thereof on appeal, or other proceedings, which may hereinafter be had in this suit.

That by this litigation and receivership, Section 5 has been taken from W. S. Noyes and awarded to the Presidio Mining Company, the assets carefully husbanded, the defendants made more affluent than ever before in their history through their shares of the moneys thus accumulated, and all stockholders greatly benefited through the efforts and energies of the complainants, one of whom Captain W. S. Overton, at all times since on or about October, 1916, has been kept on the Board of Directors by the assistance and votes of the other minority stockholders. That no loss or detriment has been suffered by defendants but only great gain as herein set forth.

WHEREFORE complainants pray that the receiver's report be approved; that the exceptions and

objections of defendants be overruled, and taxation of costs against complainants denied.

WM. F. ROSE,

Solicitor for Complainants. [336]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. S. Overton, being first duly sworn, on oath deposes and says:

That he is one of the complainants in the above-entitled suit; that he has read the foregoing and within answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information or belief and as to said matters he believes it to be true.

W. S. OVERTON.

Subscribed and sworn before me this 30th day of June, 1921.

[Seal]

HENRIETTA HARPER,

Notary Public in and for the City and County of
San Francisco, State of California. [337]

Exhibit "A."

PRESIDIO MINING COMPANY,

255 California Street,

San Francisco, Cal., July 29th, 1918,

W. F. Rose, Esq.,

Attorney at Law,

San Francisco, Cal.

Dear Sir:

Mr Handy has suggested that it might be wise

to operate the mine by using more of the low grade ore than we have heretofore been using. This would, of course, be done gradually and carefully, but as it will reduce the net earnings, I would like to have your opinion regarding such a change.

Very truly yours,

W. B. MALING,

Per F. H.

Receiver Presidio Mining Co.

W B M / F M H. [338]

Exhibit "B."

July 31, 1918.

Mr. Walter B. Maling,

Receiver, Presidio Mining Co.,

City.

Dear Sir:

Replying to your favor of the 29th inst., I expect to leave for the mine this afternoon, and will go over the matter of working the low grade ores with Mr. Handy on my arrival at the mine, and on my return will take the matter up with you fully.

Letter will likewise be forwarded this day to Mr. Wehe, with stipulation, relative to investing surplus funds.

Very truly yours,

(Signed) WM. F. ROSE. [339]

Exhibit "C."

August 24, 1918.

Walter B. Maling, Esq.,
Receiver, Presidio Mining Company,
San Francisco, Cal.

Dear Sir:

Capt. Overton has just called my attention to the fact that I had not formally notified you of the position of the Complainants relative to the working of low grade ores in the Presidio Mine at Shafter, and along the lines first indicated to us by Mr. Handy. I was under the impression I did write on my return from Texas, but find this was not done.

The complainants fully endorse the ideas of Mr. Handy and the Receiver in this matter, even though the Company income be considerably reduced thereby. It appears not only a sound business proposition, extending the life of the mine, but will permit possible discovery of considerable high grade ore. We heartily concur in this proposed policy, as heretofore indicated, both on my trip to the mine, and by Capt. Overton and myself verbally since returning.

Very truly yours,

WM. F. ROSE,

Attorney for Complainants. [340]

Exhibit "D."

San Francisco, Sept. 2, 1918.

Mr. Walter B. Maling,

San Francisco, Cal.

My dear Mr. Maling:

All of this year, we have been producing 50.000 or more ounces of silver per month at Shafter and from my intimate knowledge of the mine, I feel that this rate of production is pulling to hard on the mine.

The new equipment which we installed at the mine during 1917, after a couple of years of careful consideration and planning, was for the purpose of enabling us to work lower grade ore. That object was attained upon the completion of the plant and we had, in addition, a piece of unanticipated good fortune in the rise of silver to one dollar per ounce; which made the situation that much better.

It has always been our policy to work ore as low grade as would pay a reasonable profit, for the reason that the extraction of low grade ore was (and is) our best and most effective means of prospecting for further ore bodies. The object of this policy was, as you will readily understand, to conserve the better grade of ores as much as possible and thereby prolong the life of the mine as a going industrial enterprise, and the result of such policy has been that this mine, which is a most erratic series of replacement ore deposits, has con-

tinued in steady operation for thirty-six years; something which is rather unusual.

I strongly suggest to you that the production be reduced to 35,000 or at most 40,000 ounces per month (which will yield all the profits we were looking for in 1917) in order to conserve such good ore as we have and to enable the indirect prospecting done by the removal of ore in the stopes to be carried on by the removal of the proper ores while such poorer ores will pay, owing to the present high price of silver.

It is my opinion that we are drawing an undue proportion of the better ores in order to keep up the present rate of production, and if that course be continued, we will, before long, find ourselves with nothing but the poorer ores ready for mining.

Commanding these facts and suggestions to your consideration, I am,

Yours very truly,
(Signed) WM. S. NOYES. [341]

Exhibit "E."

San Francisco, Sept. 12, 1919.

Mr. Walter B. Maling,
7th and Mission Sts.,
San Francisco, Cal.

My dear Mr. Maling:

As you know, I have carefully abstained from intruding unasked—for suggestions upon you or in any manner interfering with your management of the business you have in hand with regard to the Presidio Mine, but a condition has arisen under

which, in my opinion, it is almost imperative that I should discuss the same with you; nevertheless, I am writing the following with great reluctance.

Under date of Sept. 6th, Mr. E. M. Gleim has written me as follows:

“On Wednesday last they had an accident in the mine which injured three men. Such things cannot be helped and it may be the fault of no one, but it has served to bring out the things which I have long heard from responsible men. They say that there have been several narrow escapes from accidents. This, perhaps, is always the case, but the men insist that the men in immediate charge continue to remove and to reduce the size of pillars until many of the Mexicans say they are afraid to work in the mine and it is reported that quite a few are going to quit on that account. They say that this is particularly true of the 220, where the ground is very heavy and the pillars are extra large. There are many reports that this very important part of the mine, so far as the future is concerned, is practically ruined and is extremely dangerous. As you know, this entire country is covered with a 30-foot talc bed and the high grade ore lies directly under it.”

I have heretofore received information to the same effect from other sources, but have waited and waited for confirmation before opening the subject with you, but the matter involved is of such sup-

reme importance to the stockholders, involving, as it does, the very existence of the mine as a mine, that I have concluded that my duty to the owners of the property will not permit me to keep silence any longer.

First, however, I want to point out several facts in that connection, viz:

1. That the entire tone of Mr. Gleim's letter is not carping; on the contrary, he does not seek to blame anyone for the late accident, but says "such things cannot be helped."
2. Mr. Gleim does not aver as a fact that any pillars have been removed or reduced in size, but says plainly that his information is hearsay and gives its source.
3. The same, or stronger, statements have been made to me by others.
4. The particular region said to be involved, namely, the 220 ft. level, is specified; so the rumor, if it is only a rumor, is not wholly indefinite.
5. In the workings known to us as Avarelia, West or 220 [342] a large cave occurred some years ago, in spite of every precaution, and a very large tonnage of ore is now inaccessible for that reason. The present 220 workings are below that just mentioned, on the dip of the strata.
6. The ground in the two places is very similar; the same stratum of talc occurs in both places and this material is exceedingly flaky and

unstable, frequently comes away from the rock in large slabs and requires more support than other ground in this mine.

7. All of those interested cannot be expected to be familiar with those phenomena; and we are all to some extent in the hands of technical employees; and it may be that those upon whom we now depend (and must depend) in such matters have not had the experience with this particular mine and the special conditions and phenomena involved which is necessary to give an assurance of the soundness of their judgment.

I therefore respectfully ask you to request of Mr. Handy a full report on this subject, stating specifically each and every spot (with reference to the map) where any material whatever has been taken from any pillar, if any such there be. It is not good practice for miners to disturb pillars where the roof is heavy, before they are ready to abandon the ground finally; and the ground certainly is heavy in that part of this mine.

This information will be as desirable for you as for all the stockholders, for the reason that if the information above referred to is founded on fact, both you and the stockholders should know it; but if, on the contrary, that information shall prove to be without foundation, as I hope it may, the stockholders will be relieved of any possible fear of menace to their property, and the last word of encomium of your administration, which has been

in all other respects beyond criticism, will have been spoken.

As an additional suggestion, I will say that if the hoisting ropes at the East shaft have not been renewed since Mr. Handy has been there, they should have immediate attention:—by this time they have been run pretty nearly to the limit of prudence.

Yours very truly,
(Signed) WM. S. NOYES. [343]

Exhibit "F."

Shafter, Presidio Co., Texas,
September 21st, 1919.

Walter B. Maling, Receiver,
San Francisco, California.

Dear Sir:

Your letter of September 15th, enclosing copy of letter from Mr. W. S. Noyes and copy of your answer to him, have been received by me, and in reply would state that the accident which occurred on September 3rd, was in what is called the Open Cut, and has no connection with the 220 workings, where it has been reported that we have taken out pillars, etc.

This accident was unavoidable; it is no more dangerous there than in any other place where we have to get out ore to keep the mill supplied. It is of course much to be regreted but was not due to carelessness on the part of those in charge.

I have never had any person working in the mine come to me and say that he was afraid to work

in the mine, or that those in charge were making it unsafe, and Mr. Thompson and Page tell me the same thing.

No men have been hurt in the 220 workings, and nothing has been done there that has ruined it or has been or will be a menace to the future.

Since December 1st, 1919, one pillar in the 220 stope has been reduced in size and one has been removed. This work was done only after careful consideration, both as regarded the future working of the property in this place, and the safety of the miners themselves. A rough sketch is enclosed, which is drawn to a scale and will enable you to place it on the map.

The first week in December last, Mr. Thompson and Mr. Page on taking over the management of the mine, found no ore broken or none in the chutes, and it was highly desirable for obvious reasons to keep the mill going steadily; after a most careful consideration of the whole matter it was decided to reduce the size of this particular pillar as there was good ore in it and it was convenient to a chute. This is the extreme western edge, and the roof here is hard limestone, with no tale showing, and it is possible in this particular place to observe the character of the ground for considerable distance above, and it is all hard and solid; the ground at this place is much easier to hold than that of the averila. I am satisfied that an examination by anyone who is a miner, will convince them that

this is in excellent shape, and that the future of this particular spot or of the stope in general has not been jeopardized.

In regard to the pillar that was removed, would say that the country immediately surrounding it was in an extremely dangerous condition in December 1918, but the pillar was not removed until early in April of this year. It stood in the main highway through the 220 stope and it was a small pillar, badly cracked and close by it were two 6x6 stulls 6 ft long, which showed signs of taking considerable weight. An incline raise was driven in back of this pillar up to a hard roof, and then the entire surrounding country was dropped with one round. The loose material was then picked off the back and the roof arched, and today it is 100% safer than it ever was. While it is true that considerable good ore was obtained, the only object in removing this pillar was to make this place safe.

The enclosed sketch will give you a good idea as to what [344] was actually done here, and an examination will show a fine arched roof, solid and firm.

The reducing in size of the pillar referred to above, was no doubt responsible for the report that was circulated early in December, that we were taking out pillars, and making the mine unsafe, etc. But I have heard no rumors or gossip since that time, and as I said before, none of the Mexicans have come to me and complained that they were afraid to work in any part of the mine, or that those

in charge were doing work that made it unsafe. And as these Mexicans appear to me to be timid, fearful and suspicious, I feel quite sure in my own mind that they would not hesitate to lay this matter before me and those directing the work in the mine if there was work being done that would put them in danger, or cave the workings.

I feel that much the best way to dispose of this whole matter, would be to send some good experienced man down here, and let him look over this whole mine carefully, and particularly where we have been working since December 1st. and make a report to you; we will do everything in our power to assist in such an examination.

As regards the matter of a new hoisting rope at the East Shaft, will say that about three months ago I wrote you as to the advisability of putting on new ropes; you wrote me to go ahead, and I ordered same from El Paso Foundry & Machine Co. on August 8th. after getting competitive prices on the rope. This came in on September 6th. and is now in place, and is in good shape.

I sincerely trust that this explanation will serve to reassure yourself and the stockholders of this Company, that we are honestly doing our best to carry all of this work along as it should be done, and that a physical examination will be made, in the near future by some capable person of the mine and the equipment.

Yours truly,
(Signed) F. C. HANDY.

We have read the foregoing and we hereby certify that the facts stated are true and correct.

(Signed) THOS. W. THOMPSON,
E. H. PAGE. [345]

Exhibit "G."

TESTIMONY IN TRIAL COURT.

Direct Examination W. S. NOYES.

Transcript page 407.

Mr. HARDING.—Q. There were statements made in the testimony of Mr. Overton to the effect that there were reports to him of charges of graft, which you were interested in down at Shafter in connection with the dealings of the company down there. Mr. Noyes, have you ever received any payment of commission on any purchases that were made by the Presidio Mining Company?

A. No, sir. ,

Q. Have you ever received any commission of any kind on merchandise down there?

A. Some years ago I had a small interest, but it did not amount to anything.

Q. A small interest in what?

A. In a commission on collections but that was some years ago.

The COURT.—What do you mean by that, Mr. Noyes?

A. We had at one time a system of collecting the bills of Mr. Gleim.

Q. In regard to what?

A. The store bills of Mr. Gleim and he allowed me a small commission. That only obtained for

a short time and I gave it up. It did not amount to anything.

The COURT.—Cannot you give some definite statement as to what period that extended over, and what you got from it?

A. It was a good many years ago and I really do not remember it.

Q. Have you a memorandum of it?

A. No, I have not.

Q. Is that while you were an officer of the company?

A. That was when I was superintendent back in the nineties.

* * * * * * * *

Page 408.

The COURT.—Let Mr. Noyes explain it—do not suggest to him. Let him explain it. I want his explanation, not yours.

Mr. HARDING.—Explain the whole situation, just what you did.

A. Well, the miners bought of them, and I collected the [346] bills for Gleim, and he allowed

2.

me, as I say, a small commission. But at the same time he sold us, and is still selling all the supplies to the company at cost to him. I gave that up a long time ago. I told him it was not a good arrangement.

* * * * * * * *

Page 409.

Mr. HARDING.—Q. How long ago did that con-

dition prevail there that you speak of, when you made collections for Gleim?

A. It is a good many years since we abandoned that. It was along about perhaps 8 or 10 years ago.

* * * * *

Page 463, 464.

Cross-examination W. S. NOYES.

Mr. ROSE.—Q. Yesterday Mr Noyes, you testified that you received some years ago a certain proportion of collections which you had been making in the way of a commission in Shafter?

A. Yes.

Q. That took place some time in the nineties as I recollect your testimony?

A. Yes, in the nineties.

The COURT.—I think the witness said that it ceased in the nineties. He did not state any definite period during which it existed.

The WITNESS.—I believe I said in the nineties, but it was in the nineties or the early part of the nineteen hundreds. It is so long ago I am unable to remember the exact dates.

Mr. ROSE.—Q. I will read now from your answer which you swore to on the 11th day of October, 1915, which is on file in this action, page 31, line 26:

“Admit that from time to time in past years he held small interests in small mercantile enterprises at Shafter, Texas, and that he disposed of all such interests about three years ago.”

A. I disposed of the last interest I had in any outside business, but these commissions were disposed of long prior to that. [347]

3.

I stepped out and left them alone.

* * * * * * * *

Page 465.

Mr. ROSE.—Q. Did you have any interest, or receive any revenue from the E. G. Gleim Company's store?

A. I testified yesterday that for a while Mr. Gleim paid me a small commission for collecting the bills for him. That was the one that was abandoned quite a good many years ago.

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BEFORE THE STANDING MASTER IN CHANCERY.

Testimony of W. S. NOYES on Direct Examination.

Page 163.

Mr. ROSE.—Q. I will ask you Mr. Noyes, how much money the E. G. Gleim Company paid to you monthly commencing with September, 1908 up to the present time? A. Mr. Gleim paid me—

Mr. DUNNE.—No, you were not asked that question. Just listen to the question. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. My records are very incomplete but from

memory I should say for about four years at \$1200 a year.

* * * * *

Page 164.

The MASTER.—Q. That covers the period from September, 1908?

A. Until the early summer or late spring of 1913. I should say it would be about four and a half years.

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Page 171.

Mr. ROSE.—Q. How did it happen to cease, Mr. Noyes?

A. In the early part of 1913 I wrote Mr. Gleim to discontinue any payments to me for the reason that I could not see that I could be of any service to him further. The payment ceased after that letter. [348]

4.

Page 185.

Mr. ROSE.—Q. (After reading from testimony given in trial court.) Does this refresh your memory Mr. Noyes as to the time within when you received this money and the date of the cessation of these payments?

A. I think there was an error in reporting it. I meant to convey to the Court that it began in the nineties. I did not intend to state that it ended in the nineties at all, because it did not. It refreshes my memory to that extent.

The MASTER.—Q. I am not quite sure that you are saying what you intend to now, Mr. Noyes.

With respect to this matter of \$100 a month, you said that it amounted to about \$5,000, as I recall?

A. From September 14th, 1908, until it ended.

Q. Oh, I see. From that date it was about \$5,000; Is that right? A. Yes, sir.

Q. As I understand you now, that same arrangement had been followed prior to 1908. A. Oh, yes.

Q. From some time in the early nineties?

A. Yes, I never have intended to imply differently. I think there were some errors in reporting the main case.

Page 186.

Mr. ROSE—(Reading from testimony given in trial court.)

“Mr. HARDING.—Q. How long ago did that condition prevail there that you speak of, when you made collections for Gleim? A. It is a good many years since we have abandoned that. It was along about perhaps eight or ten years ago.”

Q. Do you recall that testimony, Mr. Noyes? A. Yes.

Q. Does that help to refresh your memory any? A. Yes, that was a mistake.

Q. Have you any record or memorandum, Mr. Noyes, showing these payments to you from Mr. Gleim? A. No, I have not.

Q. None whatever? A. No.

* * * * *

5.

Page 192.

The MASTER.—Q. When you speak of this sum from the Gleim store as \$100 a month, was that an agreed sum per month?

A. Between Mr. Gleim and myself?

Q. Yes. A. Yes, sir, it was.

Q. And when you were referring, as I take it, to the same subject matter in the testimony which Mr. Rose read as given in the main case, you referred to a commission, did you refer to that \$100 a month?

A. The latter part of it, yes; in the early part of it, back in the nineties, he paid me a percentage, four or five per cent, I think it was.

Q. That subsequently became \$100 a month?

A. Yes, sir.

* * * * *

TESTIMONY BEFORE THE MASTER.

Deposition of E. G. GLEIM, June 13, 1918.

Page 12—Deposition—Direct Examination.

Mr. MEAD.—Q. What years was it that E. G. Gleim Company paid Wm. S. Noyes stipulated amounts for services in collecting these accounts?

A. Well, I wouldn't answer that question because E. G. Gleim Co. didn't pay Mr. Noyes; they gave it to him.

Q. What years did they give him a stipulated amount?

A. I will answer that—from 1908 until July 1915.

Q. How much did E. G. Gleim Co. give Mr. Noyes?

A. They gave him a hundred dollars a month.

Q. Is that all they gave him?

A. Yes.

Q. What was that given for?

A. Well, that would take a long explanation. It was merely a matter of gift. [350]

6.

Page 31—Deposition, Redirect Examination.

Mr. MEAD.—Q. What did you pay that \$100 a month to William S. Noyes for?

A. I gave it to him voluntarily; it was no payment at all.

Q. Why did you do that? A. Out of friendship.

Q. What had he done for you?

A. He had done a great deal for me in a friendly way. We were great friends. As I told you, he gave me that business. He asked me to take it and it turned out very successful and I was very grateful for it, and when he needed it, I helped him out and I would do so again. [351]

Exhibit "H."

TESTIMONY IN TRIAL COURT.

Cross-examination W. S. NOYES.

Page 464.

Mr. ROSE.—Q. I will read now from your answer which you swore to on the 11th day of October, 1915, which is on file in this action, page 31, line 26:

“Admit that from time to time in past years he held small interests in various mercantile

enterprises at Shafter, Texas, and that he disposed of all such interests about three years ago."

A. I disposed of the last interest I had in any outside business, but those commissions were disposed of long prior to that. I stepped out and left them alone.

The COURT.—Q. What mercantile concerns did you hold an interest in, Mr. Noyes. A. I had, as I said, this commission on collections I made, and then for a while I helped finance Mr. Bowers' business. I drew out of that some time ago.

The COURT.—Q. Cannot you give some definite date?

A. It is so long ago I am uncertain of the date.

Q. You have some idea how long that situation existed?

A. Oh, that existed—

The COURT—I regard it as material, or I would not be asking you. I would like some definite knowledge on the subject.

Transcript p. 465.

A. That situation existed perhaps for ten or fifteen years, in my earlier days.

Q. From about what date to what date?

A. From in the nineties, late nineties until 1911 or 1912.

Q. What other mercantile establishments did you have any interest in? A. Nothing else.

Q. Just the Bowers' Mercantile establishment, you say?

A. Yes. [352]

Redirect Examination.

Page 487.

MR. HARDING.—Q. You have stated you had some interest in Mr. Bowers' business. A. Yes.

Q. What was that business? A. I helped finance the starting of the business, and he paid me a portion of the profits of the business.

Q. You furnished him with some capital. What was the nature of the business? A. Hauling freight, and for the last few years he has sold us, oh, thirty-five or forty cords of wood a month.

Q. Did he do a general hauling business down there or did he haul exclusively for the mine?

A. He hauled freight for other parties, I believe. Mr. Bowers attended to that. I did not know much about the details.

* * * * *

Page 488.

Q. Can you give us any more definite idea of your relations with Mr. Bowers in that business? A. My memory is rather hazy on that.

Q. Have you been interested with him in the last five years?

A. Yes. Perhaps I withdrew from him within the last couple of years.

Q. Do you think you can look up and ascertain from any data you may have any further particulars of that business?

A. I could, at my office, look up the last division we had.

The COURT.—You must have had some corres-

pondence with him when you drew out, or closed out with him. A. I just quit.

Q. Did he buy you out or how? A. No, I just dropped out. The portion of the money I put up year ago was not great. I have forgotten just how much it was. We divided that, and within the

3.

[353] last couple of years I drew out. I thought those things were embarrassing.

The COURT.—Into a business that one has put some capital, you would do more than simply drop out, unless the business had gone to pot. A. The business has been reduced.

Q. Is not Mr. Bowers engaged in it yet? A. Yes.

Q. Actively? A. He is carrying it on by his man at Shafter.

Q. Did you have a half interest in that business?

Transcript, p. 489.

A. I was to have a half interest in the profit.

Q. Surely one who has a half interest in the profits of a business must have put up one-half of the capital.

A. I did not put up half of the capital.

Q. How did you get half interest in the profits, simply because of your relations with the mine? How did you get a half interest in the profits? What was the consideration for giving you a half interest in the profits if you did not put in half of the capital?

A. Well, there was no specified consideration other than Mr. Bowers' friendship for me.

Q. Did it not grow out from the fact that you occupied the position you did with this company, which enabled you to see that the freight was furnished for the corporation, for that company?

A. No, I didn't look at it exactly that way. It grew out of the fact that I saw the necessity of reliable transportation.

Q. But a man usually does not carry friendship into a business to the extent of paying money for it. Now, unless you put in one-half of the capital, I do not understand upon what principle you would be entitled or would be accorded, one-half of the profits. [354]

4.

A. Well, at that time —

Q. You can readily understand, Mr. Noyes, that these inquiries are not idle? A. Yes.

Q. Because of the circumstances involved in this case, I should like to have you fully, frankly, and clearly, state the nature of that transaction.

Mr. HARDING.—Q. How long ago was it that you had an interest in that hauling business?

A. With Bowers?

Tr., page 490.

Q. Yes.

A. Oh, that began some time in the nineties.

Q. Will you look in your office and see if you have any data in regard to that matter?

A. Yes, I will look over what data I have.

* * * * *

The COURT.—Mr. Noyes, have you any statements that were furnished to you by Mr. Bowers

during those years, and while you have had your office here in San Francisco, as to the state of your account with him?

A. Mr. Bowers never made me any further statement than to send me sums of money

Tr., page 290 $\frac{1}{2}$.

from time to time, stating that was my share of the profits of the business. The details of it were left entirely to him, and if there were any statements sent, they were sent by his representative, and I never looked into the details of them at all.

Mr. HARDING.—Q. Do you know whether or not Mr. Bowers keeps books of that business?

A. I am not certain. I believe he does. That business was so small, that I simply left the whole thing to Mr. Bowers, and never gave it any attention.

The COURT.—Q. What was it, in its general nature, outside of [355] freighting?

A. Freighting was the main business, together
5.

with the small amount of wood that was used at the mine for a number of years past.

Q. Freighting and dealing in wood, dealing in hay, or anything of that kind?

A. I was about to add that Mr. Bowers informed me that he supplied his own teams, wagons, hay, and feed, and made a profit on that.

Q. It was not a general merchandising business in any way? A. No, sir, it was not.

* * * * *

BEFORE THE STANDING MASTER IN
CHANCERY.

Testimony of W. S. NOYES on Direct Examination.

Page 198.

Mr. ROSE.—Q. How much money per year would you say you obtained from Benton Bowers between the period commencing September 1908 and February 1918, a period of approximately ten years, or nine years and a few months?

A. I have a memorandum here covering part of that time, and I will refer to it to get the dates: from September, 1908, to the time I abandoned the business I have a record of \$1695.

Mr. DUNNE.—Q. When did you abandon the business?

A. Three or four years ago, I have not the date of that.

Mr. ROSE.—Q. What does your record show, Mr. Noyes?

Mr. DUNNE.—He said \$1695 approximately, from September 1908 until he abandoned the business.

Page 199.

A. I drew out of the business in 1913 or 1914, according to my present recollection, either 1913 or 1914.

Mr. ROSE.—Q. You cannot state the exact date?

A. No, I cannot.

* * * * *

6.

Page 202.

The MASTER.—Q. Referring to this \$1695, Mr. Noyes, was this a profit from a business in which you had capital?

A. I put capital into it in the first place with Bowers. We got the capital out in perhaps four or five years.

Q. Long preceding 1908.

A. Away long preceding 1900.

* * * * *

Page 204.

* * * The upshot of that conversation was that I put in about \$4,000 with him to help him carry the wood. Wood that was cut and stacked up to dry would require seven or eight or nine months before it was delivered to the company and he could get the money. Before I got through, as I say, I had \$4,000 or a little over that in the business with him.

* * * * *

Page 205.

The MASTER.—Q. During this time you were an officer of the Presidio Mining Company?

A. I was superintendent.

Q. Were your relations with the company and Bowers disclosed to the company at any time?

A. Yes, I talked to some of the people about it.

Mr. ROSE.—Q. Who did you talk to about it, Mr. Noyes?

A. I think I talked to the secretary about it, the old secretary, in years gone by.

Q. To Mr. Osborn? A. Yes.

Q. Anybody else?

A. I could not say positively yes or no to that.

Q. As a matter of fact Mr. Noyes, the directors of the company and the stockholders generally knew nothing at all about your transactions with those outside parties, isn't that a fact? [357]

7.

A. I don't know why it should be; there was no effort made at concealment.

Q. But you never took any pains at any time to let anybody know of your doings or dealings with those third parties. You never reported it to anyone or on any record of the company, did you?

A. There was no occasion to report it, to the stockholders' meetings. The stockholders are concerned in the mining operations of the company.

Q. I say, as a matter of fact, there was no report to the directors so that they knew anything about your dealings with third parties?

A. No, I don't suppose there was.

Q. And so far as you can recall, Mr. Osborn is the only man you talked to, and he was the secretary of the company?

A. He is the only one I can be positive about now.

* * * * *

Page 209.

Mr. ROSE.—Q. It is a fact, is it not Mr. Noyes, that you have had at all times in the last twenty-five years the actual control over the giving of contracts between the Presidio Mining Company and third parties at the town of Shafter, or connected

with supplying materials or goods to the company, or hauling supplies to the company?

* * * * *

A. I bought the goods for the company, of course.

Mr. ROSE.—Q. That does not answer the question.

A. I answered that I bought all the goods for the company and I took the choice as to where to buy them.

The MASTER.—Q. Then your answer to the question is yes, isn't it? A. Yes.

* * * * *

[358]

8.

TESTIMONY IN TRIAL COURT.

Direct Examination of BENTON BOWERS.

Page 492.

Mr. HARDING.—Q. You just heard the testimony of Mr. W. S. Noyes, that he has some interest with you in that business?

A. Well, he had an interest in the profits. He helped finance it.

* * * * *

Page 493.

Q. Can you recollect how much money approximately, Mr. Noyes—to what extent did he assist you?

A. I remember at one time, I had over \$8,000 on the books, that I had advanced, and Mr. Noyes was responsible for about one-half of that, as I needed money. If I was short, he helped me. The under-

standing was if I fell down or anything happened, why he was to stand half the loss.

* * * * *

Q. Can you recollect how long ago Mr. Noyes ceased to be interested with you in that business?

A. I was looking into my memorandum book. It has been a couple of years or so ago. The business got down to such a small matter, that the profits did not amount to anything.

Page 497.

Q. Did you keep any books in regard to Mr. Noyes' interest in the business?

A. No; every month when I settled up with my man, whatever there was I just turned it over, with the exception of the balance I kept to carry on the business with. It was settled monthly or every two or three months, if there could be anything taken out of the business. Whatever profits there were would be just sent to Mr. Noyes. I would just send him a check for them.

Page 498.

Q. Have you got any books showing these transactions?

A. No, I have not. We quit the business—that is, my man is running the business down there now' and once in a while [359] he sends me a small

9.

check, maybe once or twice a year. When he gets \$250 or something like that, when he sells quite a lot of stuff, maybe in three or four months I will get a \$500 check. It depends on the amount of stuff that he sells. Whatever the profit is, I di-

vided it up with Mr. Noyes, but that stopped some time ago.

* * * * *

Page 602.

A. I remember that I had on the books about \$8000 at one time advanced in that wood business on the river.

The COURT.—Q. Advanced by you?

A. Mr. Noyes and I. He told me just to draw on him for half of his part of the money.

* * * * *

The COURT.—Q. What was the result of the matter?

A. We made no profit the first year. We did not make any profit until we commenced to deliver this wood and began to get back the money that we had advanced on these teams, and the wood that we had cut and hauled out there to dry.

* * * * *

Page 603.

Q. How many years did it take before you got your money back?

A. Four or five years, probably a little longer, before we got all our capital back.

Q. After that, what did you make out of it?

A. After that?

Q. Yes, sir.

A. That varied according to the prices we had to pay for the stuff. We got about \$100 a month out of it for two or three years.

Q. Both you and Mr. Noyes together?

A. Yes, sometimes it would run a little more and sometimes a little less.

The COURT.—Q. \$100 gross or \$100 for each of you? A. \$100 for each of us. [360]

10.

BEFORE THE STANDING MASTER IN
CHANCERY.

Testimony of BENTON BOWERS on Direct Examination.

Page 629.

Mr. ROSE.—Q. Now Mr. Bowers, can you state how much per month you paid to Wm. S. Noyes, commencing in the month of September 1908, up to the time when any payment ceased from you to Mr. Noyes?

A. No, not any month, because I never got anything out of the business monthly; whenever there was a surplus of more than what was needed to carry on the business, my representative would send me a check for it, and I would send Mr. Noyes a check for his part of it.

Q. Can you give me any idea at all, Mr. Bowers, as to the amount of money that you paid, commencing with 1908, in September of that year?

A. It would not exceed \$500, I don't think, a year.

Q. Do you know whether or not you sent Mr. Noyes, for instance in the year 1912, approximately \$500?

A. Well, I think it ran about that. I never kept any account of it because whenever I made the settlement, it was a closed incident.

Q. Do you recall whether it was \$600 in 1913?

A. No, I don't. I generally got the checks in about \$500 and sometimes there was one or two years that the year would run over before I would draw anything out of the business; sometimes we had to advance considerable; whenever it was not necessary to keep the money there, my representative would send me a check for it. He has sent me a check when it would run over a year for as high as \$1000; that was the most that was ever sent, and it would perhaps be from the year back. I never gave him a check for over \$500.

* * * * *

[361]

11.

Page 630.

Q. Do you know when you last sent Mr. Noyes any money under these arrangements?

A. I don't think there was ever anything—in fact, I think it was 1914, as I remember it, in the early part of the year, that he dropped out of the business; it got so small that there was very little to be made; the profits ran down until there was very little to be made.

Page 642.

On Redirect Examination.

Mr. ROSE.—Q. Did Mr. Noyes ever put up any actual money with you at all?

A. Yes, he left money in the office for me to check against.

Q. Do you know how much money he put up?

A. I have not that in mind.

Q. Can't you approximately?

A. The money that I advanced he put up half of it.

Q. How much did you advance?

A. I advanced at one time, over \$16,000 on the books.

Q. Do you know whether that was Mr. Noyes' own money or the money of the Presidio Mining Company?

A. I have no knowledge of that. I know that part of it wasn't—I can say that.

* * * * *

Page 643.

The MASTER.—Q. You say that you know some of the money was Noyes' money. In other words, that it was earmarked; how much was it?

A. We made arrangements to get the money advanced.

Q. From a bank? A. No, from a merchant.

Q. You borrowed some money?

A. Yes. The \$16,000 was all contracted with one firm, or practically all of it.

Mr. ROSE.—Q. Where did you borrow the money?

A. From E. G. Gleim Company.

Q. In other words, Mr. E. G. Gleim advanced to you and to Mr. Noyes [362] \$16,000 for financing

12.

this so-called wood business, is that the way the matter took place?

A. I made arrangements with Mr. Gleim whereby I could get the advances, and I got the money from

him; in buying material, I bought it through him.

Q. And as a matter of fact, Mr. Noyes did not put up any money at all of his own at any time, did he? A. Yes, he did.

Q. He went good for that \$16,000 with you, is that the way it was done?

A. Before that he put money in the office where I could check against it.

Q. How much did he put in the office that you could check against?

A. I remember that there was \$800 at one time.

Q. Do you know if that money was Mr. Noyes' money or whether that money was the money of the Presidio Mining Company?

A. No, all I know is that he put the money there for me. The money was there in Mr. Noyes' envelope, and he told the clerk to take the money out of his envelope and let me have what I wanted.

Q. And there was as much as \$800 at one time that you know of that was earmarked in that way?

A. Well, I got that amount of money.

Q. From one of these so-called envelopes, you say, \$800? A. Yes, about that.

Q. And the large amount of money then, the \$16,000, came from Mr. E. G. Gleim and was secured by a promissory note, was it? A. No, sir.

Q. Just advanced on your say-so?

A. Yes, it was just advanced on my say-so.

Q. In other words, yourself and Mr. Noyes got Mr. Gleim to advance you \$16,000 altogether to

carry on this wood enterprise?

A. Yes, sir.

* * * * * * * *

[363]

13.

Pages 646, 647.

Q. Did Mr. Noyes ever directly or indirectly appear in any of your transactions with third parties arising out of these contractual relations and the sales? A. No, sir.

Q. Did anyone down there know that Mr. Noyes was interested with you in this proposition—anyone outside of yourself?

A. If they did I do not know it.

The MASTER.—Q. Did Mr. Gleim?

A. I don't think he did.

Q. Did Mr. Noyes guarantee this account of \$16,000 as well as you?

A. No, sir, Mr. Gleim was in a position to see exactly what I was doing. I counselled with him considerable with regard to the matter, as he had been in business there a long time. [364]

Exhibit "I."

TESTIMONY IN TRIAL COURT.

Cross-examination W. S. NOYES.

Page 465.

Mr. ROSE.—Q. Did you receive any revenue at all from Mr. Mann, or from anyone connected with the mine boarding-house?

A. Also in the nineties I had a little interest with

Mr. Mann in the mine boarding-house. It did not amount to anything.

Page 466.

I dropped that.

The COURT.—Q. Tell me more particularly about that. Your suggestion that it did not amount to anything and you dropped it does not mean anything to me. I would like to secure a more definite statement.

A. It made no money.

Q. What was the arrangement?

A. Mr. Mann was the foreman of the mine. It was always one of the most difficult things to carry on a mine boarding-house and get anyone to run such a boarding-house. I put up a little money with Mr. Mann—he put up some more, and he ran the boarding-house. He used to make from 20 to 30 or 40 dollars a month from that. It got down so it paid nothing though, a number of years before Mann quit, and we just called it off.

Q. How long did that subsist there?

A. Oh, perhaps 7 or 8 years.

Q. During what period?

A. About 1895 it began, something like that.

Redirect Examination W. S. NOYES.

Page 485.

Mr. HARDING.—Q. Will you go into detail and explain the circumstances under which you became interested in the boarding-house down there? Just explain the general conditions that existed there in those days, at the mine? [365]

2.

The COURT.—Q. Haven't you any data of those matters by which you can give us some idea, some more definite idea, as to when these relationships existed between you and these different enterprises down there?

A. Nothing but my memory.

Mr. HARDING.—Q. How much had you invested in the boarding-house down there?

A. Oh, two or three hundred dollars. That was some time between 1893 and 1895 that Mr. Mann and I made that arrangement. We each put up that amount of money to buy the equipment, such as dishes and things that were required to carry that on, and we made thirty or forty dollars a month apiece out of it for a little while, for a few years. After that the number of white men who boarded at the house kept getting smaller and smaller, and finally it got down so there was no profit in the outfit, and I told Jim to go ahead and I would step out.

Page 486.

Q. He ran it after that alone?

A. He ran it after that, yes. Since Mr. Mann has given it up.

* * * * *

BEFORE THE STANDING MASTER IN
CHANCERY.

Direct Examination W. S. NOYES.

Page 220.

Mr. ROSE.—Q. Did Mr. Mann conduct the mine boarding-house between September 1908, and there-

after, up to the time of the entry of the decrees herein? A. No.

Q. How long did he conduct it?

A. He conducted it until September, 1910. He left Shafter in September, 1910.

Q. Was the mine boarding-house continued after Mr. Mann moved away? [366]

3.

Page 221.

Q. Did you receive any moneys from Mr. Mann from the mine boarding-house during 1908 and 1910? A. I did.

* * * * *

Page 222.

Q. How much a month?

A. About \$10 a month, until the summer of 1910, a short time before Mr. Mann left there, when I told him that the earnings were so small it was not worth dividing, and to go ahead and make what he could out of it.

Q. This building or structure in which the boarding-house was conducted by Mr. Mann belonged to the Presidio Mining Co., did it not? A. It did.

Q. And Mr. Mann at that time was also an employee of the Presidio Mining Co.?

A. He was the foreman of the mine.

* * * * *

Pages 224, 225.

Q. And during this period you were superintendent of the mine, Mr. Noyes, and had full charge of all its operations? A. I was.

Q. And did any stockholder or director know of this relationship?

A. I could not say positively as to that.

Q. Do you recall ever talking with anybody about it connected with the company up here?

A. I don't recall talking about that specifically.

* * * * * * * *

[367]

4.

Cross-examination W. S. NOYES.

Page 242.

Mr. ROSE.—Q. But Mr. Mann was under your control and you could discharge him at any time you saw fit and as a matter of fact, you did do so ultimately; isn't that a fact?

A. That is a fact, yes.

Mr. HARDING.—Q. Mr. Mann continued in the employ of the company after you severed your connection with the boarding-house, didn't he?

A. For a short time; I cannot tell exactly for how long, but for a month or two. [368]

Exhibit "J."

PRESIDIO MINING COMPANY,

255 California St.

San Francisco, California, Feb. 15, 1919.

Mr W. F. Rose, Attorney for Complainants in the
action of Overton et al. vs. Presidio Mining
Co. et al.

Dear Sir:

Replying to your letter of January 9th, 1919,
requesting a full and complete report covering all of

the ramifications of the latest trouble at the Mine occurring immediately preceding, at, and during the period following the resignation of E. M. Gleim, Superintendent, I beg to report as follows:

Immediately upon receipt of your letter, I requested Mr. Wehe, as my attorney, to attend to the matter. He thereupon wrote to Mr. Handy, requesting a compliance with your letter, and also requesting that he give nothing but facts and circumstances within his knowledge.

In response to that letter, Mr. Handy has written me a letter as follows:

“Shafter, Presidio Co., Texas.

January 28, 1919.

Walter B. Maling, Receiver,
San Francisco, California.

Dear Sir:

In obedience to your instructions to me to furnish you with a statement of the facts concerning the affairs of the mine immediately preceding, at, or during the period covering the resignation of Mr. E. M. Gleim, I respectfully submit the following:—

Mr. E. M. Gleim tendered his resignation to me as Superintendent on November 7th, 1918. The next day, in the forenoon, Mr. James Sloan, the Mine Foreman, called me up on the telephone and informed me that he was going to quit at the same time that Mr. Gleim did I told him at that time that there was no reason for him to resign, and that I would like him to continue on during the time that I would be here. He said that [369]

W. F. R. (2)

Feb. 15, 1919.

Mr. Gleim had been a good friend of his, and that he would not stay after he went out. I gave him a chance to reconsider that evening, through Mr. Russell, but he reiterated his intention of going out with Mr. Gleim.

Some days after this M. W. Kehoe, employed as Melter, notified the Mill Foreman that he was going to quit. In talking this over with Mr. Kehoe, he told me that Mr. Gleim was an old friend of his; that he did not think that he had been treated right; and that further, he had heard that he was going to be discharged at the same time that Mr. Gleim went out. I assured him that there was no foundation for any such rumor, and that I was satisfied with his work, and that he could reconsider his resignation and remain. He later informed me that he would go, and he is now, I understand, working for Mr. Gleim at his Quicksilver mine at Terlingua, Texas.

On December 1st, P. F. Wagner, Tramway Foreman, notified me that he was going to quit, and would not stay longer than December 5th. I asked him his reason, and he too, said that he was an old friend of Mr. Gleim's; that he did not think that he had been treated rightly; further, that he had been told that when I first came down to Shafter I had said that I did not think that the work he did was worth the money that the Company paid. I reminded him of the fact that his wages had not been reduced, but on the other hand that they had been increased, and I assured him that there was no reason for his quit-

ting as far as I was concerned, and I told him that I would like to have him remain. He had previous to this told me, and others, that he had no intention of quitting.

On December 5th, 1918, Fred Smith, Engineer at the Mine Power House, quit after giving the Mine Foreman three hours' notice, and gave no reason for this action. He had been in the employ of the Company for a number of years. I had never come in contact with this man in any way, as far as his work was concerned, and considered him a reliable man, and satisfactory.

About December 12th, Henry Brooks, Master Mechanic, and another employee who had been in the employ of the Company for a long time, resigned, to take effect December 20th. This man had assured me on two occasions previous to this that he intended to remain; that Mr. Gleim was an old friend of his, but that for several reasons he could not afford to quit. I assured him that I was perfectly satisfied with him in every way, and that there was no reason why he should quit. I was much surprised when he announced his intention of leaving, and about the only reason that he could give me was on account of Mr. Thompson being appointed mine foreman in place of Mr. Sloan.

In this connection, I would state that after Mr. Sloan notified me of his intention of quitting I spoke to practically all of the Americans and told them that there were to be no changes of any kind, and that as long as a man did his work fairly that he had nothing to fear, and I instructed the Mill Foreman to so in-

form every one. I asked Mr. Russell, Mr. Navarro and others that had influence with the Mexicans to assure them that there were to be no changes. [370] W. F. R. (3) Feb. 15, 1919.

During the first ten days of December, the Mexicans were uneasy and disturbed on account of the talk that was going around. I was told by different parties that it was being told by employees who had quit that the mill would have to be shut down, that we could not get out the ore. Another story that came to me was to the effect that the Receiver was going to pull down the pillars in the mine, cave it in so that it would have to be shut down, and Mexicans be out of work.

Mr. H. B. Young, who was at that time County Judge, came to me on Dec. 8th and said that he was very sorry to see efforts that were being made to get men to quit, and to embarrass me, and that he considered the condition serious; that it was to the best interests of the people of Shafter that the mine and the mill operate continuously, and that a shut-down would be very serious. He voluntarily offered the services of himself and his sons to help us in every way that they could, on account of our being short-handed. I took it that Mr. Young should be pretty well informed, as he comes in contact with the Mexicans, and knows them all, and appears to have their confidence.

In answer to your question as to the whereabouts of the men who resigned, would say that Mr. Gleim and Mr. Sloan are here in Shafter and are operating a mine near Section 5 of the Presidio Mining Com-

pany. Mr. Wagner is here in Shafter and is back and forth to a ranch on the river that he and Mr. Gleim are jointly interested in. Mr. Smith has left Shafter, and I have no information as to his whereabouts. Mr. Kehoe, as previously stated, is at Mr. Gleim's Quicksilver mine at Terlingua, his family being here in Shafter. Mr. Brooks is at El Paso, but I am informed that he intends to return to Shafter in March.

It is common talk here in Shafter that these parties have stated that they expect to be back in their respective positions in February, 1919.

The following is a statement rendered to me by Mr. T. W. Thompson, Mine Foreman, who succeeded Mr. Sloan as such on December 1st, 1918:

“When I took charge of the Mine I had two serious difficulties to contend with: first was the condition of the mine, and second was the working attitude of the Mexicans. On account of the erratic occurrence of the ore and the number of working places, a large amount of ore (practically a month's supply) must be kept on hand broken in the mine. The mine is especially well equipped for this purpose. On December 1st, the two chutes from the 400 ft. level to the 500 ft. level were practically empty, as well as the main chutes from the 300 ft. level to the 400 ft. level; also the chutes from the stopes to the 300 ft. level were empty and there was very little ore broken in the mine. Heretofore, all of these chutes were kept full. Dumping a car of or down these chutes, when they were empty

naturally broke the timber at the bottom, which had to be repaired.

The working attitude of the Mexicans was undoubtedly the result of malicious propaganda. They were assured that Mr. Sloan would return in February and that there was [371]

W. F. R. (4)

Feb. 15, 1919.

no necessity of working hard as I could not operate the mine under any circumstances. As late as Dec. 12th, Mr. Sloan went to the home of a Mexican in the employ of the Company and told him, the Mexican, that he would return in February. He also told the Mexican that a number of men were intending to leave the employ of the Company on December 15th, and asked him what he was going to do. The Mexican replied that he intended to work as long as the Company would give him a job. At this time there was a persistent rumor that the mine would shut down on December 15th, due to the lack of ore. A Mexican shift-boss, a brother-in-law of Mr. Sloan, on leaving the employ of the company on Dec. 5th, informed others that he intended to return with Mr. Sloan in February. Luis Pacheco, another brother-in-law of Mr. Sloan, had repeatedly remarked that Mr. Sloan would return in February and dismiss men that are now in the employ of the Company. This individual, I think, is responsible for the rumor that I was incapable of operating the Mine and was only taking old pillars left by Mr. Sloan.

Mr. Sloan, himself, during the first part of December, has asked men to leave the employ of the Company, and a Mexican, Alejandro Munoz by name, who is employed by Mr. Sloan, was in the first part of December seen at the mine office, and has asked men to leave the employ of the Company.

All of these stories kept the Mexicans in a state of unrest and wondering whether or not the Company would operate. As soon as the trouble makers were weeded out and the Mexicans saw that the Company intended to operate, they accepted the changes and are at present apparently well satisfied.

All of the time that I was employed by the Company and Mr. Gleim was superintendent, he was always friendly and cordial toward me. When he was notified that I was to take charge of the mine, I immediately noticed a change in his attitude. On November 26th, on a stormy day, we went to the mine together, and were met by Mr. Sloan with the greeting that I must want his job pretty bad to come out on a day like this. We proceeded to the mine office, and the first words spoken in regard to the work were from Mr. Gleim who said 'Well, Thompson, what do you want to do?' I replied that I did not want to do anything, but thought that if Mr. Sloan was going through the Mine I would go with him. I told Mr. Gleim that I noticed a change in his attitude toward me and that I could see no reason why there should be. He replied that he knew he had no reason to be sore at me as long as some one had to fill the Mine Fore-

man's position, but he was sore at the treatment he had received, and it made him sore to think that a friend of his (meaning me) would take the place of another friend. I attempted to show him the absurdity of such logic, but of no avail, and we three proceeded through the mine. I asked Mr. Sloan two questions which he answered and that was the limit of the conversation as far as the work was concerned. After my trip through the mine with Mr. Sloan and Mr. Gleim, I felt as well compensated as a blind man leaving a movie.'

Mr. Thompson experienced a great deal of trouble during the first ten days in getting out enough ore to keep the mill running, owing to the difficulties that he speaks of, [372] but after the receipt and

W. F. R. (5)

February 15, 1919.

posting of your telegram of the 13th of December, the attitude of the Mexicans changed, and more men applied for work.

Mr. Gleim had told me that with Sloan, Brooks and Wagner on the job nothing could stop the running of the plant. When these three men and other quit, without practically any notice, it made me apprehensive. Mr. Sloan had remarked to me more than once that in thirty days he could close the whole works down, for want of ore of proper grade; when Mr. Thompson reported the condition of the mine and the attitude of the Mexicans, I became more apprehensive. I did not want to have to shut the mill down for lack of ore, as it meant a loss to the Company, and it meant a disorganization of the Mexicans.

Your telegram of December 13th, signed by yourself, Mr. W. S. Noyes and Mr. B. S. Noyes had the effect of reassuring the Mexicans, and we could feel for the first time since December 1st that the Mexicans were going to settle down and that things had a chance to return to normal conditions.

In reply to your question as to whether Mr. Gleim, Mr. Sloan, or any of the parties leaving the Company employ, occupy its, or go on its property, would say that to my knowledge and information, they do not. I have never noticed them at the mill or mine, and know that they do not occupy any of the Company's quarters.

Yours truly,

F. C. HANDY."

As to my telegram of December 13th, to which reference is made in the report, the following is a copy of the same:

"San Francisco, Cal., Dec. 13, 1919.

Fred C. Handy,

c/o Presidio Mining Co.,

Marfa, Texas.

You may assure all employees of the Presidio Mining Company and of the Receiver that it is the desire of the Company that the mine should be carried on as heretofore. Assure all employees that no employee will lose his position hereafter because he retains his position under the Receiver. If reports to contrary are being circulated by former employees, they do not have the endorsement of the Company. Give a copy of this telegram to Frank

Russell, also the Priest and E. G. Gleim Company and any other person interested and request their assistance.

(Signed) WALTER B. MALING,
Receiver.

PRESIDIO MINING COMPANY,
By B. S. NOYES,
President.

WM. S. NOYES,
Vice-President." [373]

W. F. R. (6) Feb. 15, 1919.

I have filed a copy of this letter and the original report of Mr. Handy in the office of the Presidio Mining Company, and have sent a copy of this letter to defendants' attorneys.

Respectfully,
(Signed) WALTER B. MALING,
Receiver Presidio Mining Company.

Copy of the within answer received this 1st day of July, 1921.

R. J. HARDING and
HENRY E. MONROE,
Solicitors for Defendants.
FRANK R. WEHE,
By C. R. JOHNSON,
Attorney for Receiver.

[Endorsed]: Filed Jul. 1, 1921. W. B. Maling,
Clery. By J. A. Schaertzer, Deputy Clerk. [374]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

**Affidavit of Walter B. Maling on Defendants'
Exceptions and Objections to the Fourth and
Final Account and Report of Receiver, and
all Prior Accounts and Reports.**

State of California,

City and County of San Francisco,—ss.

Walter B. Maling, being first duly sworn, deposes
and says:

That I am the Receiver in the above-entitled
action, and that immediately after my appointment
as such Receiver in February, 1918, and prior to
the 26th day of March, 1918, I appointed Mr. F. C.
Handy to act as my representative in Texas, and
placed him in charge of the mining operations of
the Presidio Mining Company at Shafter, Texas.
That immediately after said appointment I fixed
the salary of said representative tentatively at

Four hundred and fifty (450) Dollars per month, and thereupon and prior to said 26th day of March, 1918, [375] instructed my attorney, Frank R. Wehe, Esq., to make a full report concerning the matter, including the qualifications and ability of Mr. Handy to satisfactorily fill the position mentioned, to the attorneys for all of the parties to said action, with a view to having the same understood by them and to get their consent to the rate of salary paid.

That on March 29th, 1918, said attorney reported to me that he had informed the attorneys for all of the parties to said action of the above, and he delivered to me a letter from William F. Rose, attorney for complainants, in the words and figures following, to wit:

“San Francisco, March 26, 1918.

Frank R. Wehe, Esq.,

74 New Montgomery St.,

City.

My dear Sir:—

Replying to your communication of March 23d relative to salary of Mr. Handy:

On the strength of your report to me relative to Mr. Handy's qualifications and ability to satisfactorily fill the position as representative of the receiver at the Presidio Mine in full charge of its affairs, I see no objection to paying him the sum of \$450.00 monthly as salary, and hereby consent thereto for and on behalf of complainants in the

suit of Overton v. Presidio Mining Company, et al., in which suit Mr. Maling is the receiver.

Very truly yours,
(Signed) WM. F. ROSE."

the original of which is annexed hereto.

Also delivered to me a letter from Messrs. R. T. Harding and J. J. Dunne in the words and figures following, to wit: [376]

"San Francisco, Mar. 28, 1918.

"Frank R. Wehe, Esq.,
74 New Montgomery St.,
San Francisco, Cal.

My dear Sir:—

Replying to your communication of March 27th relative to salary of Mr. Handy:—

On the strength of your report to me relative to Mr. Handy's qualifications and ability to satisfactorily fill the position as representative of the Receiver at the Presidio Mine, in full charge of its affairs, I see no objection to paying him the sum of \$450 monthly as salary and hereby consent thereto for and on behalf of defendants in the suit of Overton vs. Presidio Mining Company, et als., in which suit Mr. Maling is the Receiver.

Yours very truly,
(Signed) R. T. HARDING
J. J. DUNNE."

the original of which is annexed hereto.

Also at about the same time I instructed said attorney to take up with the attorneys for the parties the question of the employment of a book-

keeper in the San Francisco office, and inasmuch as John W. F. Peat was the Secretary of the Presidio Mining Company at that time, I considered it to the interests of the trust to continue said Peat as the bookkeeper at the Company's office for the purpose of keeping my accounts as Receiver, but did not care to do so without the consent of all of the parties inasmuch as said Peat was a defendant in the action. I was shortly thereafter informed by Mr. Wehe that he had taken the matter up with the attorneys and he delivered to me a stipulation signed by the attorneys for the parties and in the words and figures following, to wit:

(Title of Court and Cause.)

"It appearing to the attorneys for the parties to the above-entitled actions that the Receiver herein desires to employ JOHN W. F. PEAT, former Secretary of [377] the Presidio Mining Company, as his bookkeeper in keeping the accounts and books of said Presidio Mining Company at its office at the City and County of San Francisco, of which office said Receiver is now in possession, but that he does not desire to make the appointment without the consent of all parties to said action inasmuch as said Peat is a party defendant, to said action;

IT IS HEREBY STIPULATED that said parties, by their respective attorneys, consent to the employment of said Peat as such bookkeeper at a salary of not to exceed One Hundred (100) Dollars per month, without complainants waiving any rights against said defendant, John W. F. Peat.

Dated this 21st day of March, One thousand nine hundred and eighteen (1918).

WM. F. ROSE,
Attorney for Complainants.
R. T. HARDING,
J. J. DUNNE,
Attorneys for Defendants.”

the original of which is annexed hereto.

That I continued said Peat as bookkeeper until he became sick and resigned, and then appointed a successor, and afterwards that bookkeeper resigned, and I appointed Miss Handy, who was the bookkeeper until I turned the office over to the defendant Presidio Mining Company.

That during all times during my receivership a bookkeeper was a necessity for the proper discharge of my duties as such Receiver.

That during all of the time of my receivership I have to the best of my ability conducted and managed the said trust in good faith as economically as conditions would permit, and for the best interests of the parties to said action and as [378] ordered by the Court.

WALTER B. MALING.

Subscribed and sworn to before me this 5th day of August, 1921.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California. [379]

Law Offices
WILLIAM F. ROSE,
614 Mills Building,
San Francisco.

Sutter 46.

March 26, 1918.

Frank R. Wehe, Esq.,
74 New Montgomery St.,
City.

My dear Sir:

Replying to your communication of March 23d relative to salary of Mr. Handy:

On the strength of your report to me relative to Mr. Handy's qualifications and ability to satisfactorily fill the position as representative of the receiver at the Presidio Mine in full charge of its affairs, I see no objection to paying him the sum of \$450.00 monthly as salary, and hereby consent thereto for and on behalf of complainants in the suit of Overton vs. Presidio Mining Company, et al., in which suit Mr. Maling is the receiver.

Very truly yours,

W. F. ROSE.

San Francisco, Mr. 28, 1918.

Frank R. Wehe, Esq.,
74 New Montgomery St.,
San Francisco, Cal.

My dear Sir:

Replying to your communication of March 27th relative to salary of Mr. Handy:

On the strength of your report to me relative to

Mr. Handy's qualifications and ability to satisfactorily fill the position as representative of the Receiver at the Presidio Mine, in [380] full charge of its affairs, I see no objection to paying him the sum of \$450.00 monthly as salary and hereby consent thereto for and on behalf of defendants in the suit of Overton vs. Presidio Mining Company, et al., in which suit Mr. Maling is the Receiver.

Yours very truly,

R. T. HARDING.

J. J. DUNNE.

(Title of Court and Causes.)

It appearing to the attorneys for the parties to the above-entitled actions that the Receiver herein desires to employ John W. F. Peat, former Secretary of the Presidio Mining Company, as his bookkeeper in keeping the accounts and books of said Presidio Mining Company at its office at the City and County of San Francisco, of which office said Receiver is now in possession, but that he does not desire to make the appointment without the consent of all parties to said action inasmuch as said Peat is a party defendant to said action;

It is hereby stipulated that said parties, by their respective attorneys, consent to the employment of said Peat as such bookkeeper at a salary of not to exceed One Hundred (100) Dollars per month, without complainants waiving any rights against said defendant, John W. F. Peat.

Dated this 21st day of March, one thousand nine hundred and eighteen (1918).

WM. F. ROSE,
Attorney for Complainant.

R. T. HARDING,

J. J. DUNNE,

Attorneys for Defendants.

Due service and receipt of a copy of the within affidavit is hereby admitted this 6th day of August, one thousand nine hundred and twenty-one (1921).

R. T. HARDING,

HENRY E. MONROE,

Solicitors for Defendants. [381]

Personally delivered copy hereof to clerk of R. T. Harding, solicitor for defendants, and to the clerk of Wm. F. Rose same for complainants, at the office of each in this city on August 6th, 1921, at about 9:20 A. M., both being absent from their office.

FRANK R. WEHE.

[Endorsed]: Filed Aug. 8, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [382]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
et al.,

Defendants.

Memorandum Opinion.

VAN FLEET, District Judge:

EXCEPTIONS TO RECEIVER'S ACCOUNT.

Defendants have misapprehended not only the proper time but the form in which to ask the relief they are really seeking. There is no exception taken to the correctness or propriety of any particular item of the Receiver's account but the objection really is to the items of that account being charged or allowed against the fund administered, the contention being that they should under the circumstances of the case be charged to the plaintiff who procured the appointment of the Receiver. But that question will more properly arise on a motion to tax the costs upon the entry of the final decree.

Whether the objection that the court had no jurisdiction in the cause dwelt upon at such length is

made seriously it is difficult to know but, if it is, it is without merit as could readily have been ascertained by reference to the decree of the Circuit Court of Appeals wherein the decree of this Court was affirmed in its major features. That, of course, could [383] not have been done in the absence of jurisdiction in this court since the appellate court could have no jurisdiction to enter a decree upon the merits if jurisdiction was lacking here. The order appointing the Receiver was reversed merely on the ground that the facts of the case in the opinion of the Circuit Court of Appeals did not warrant it, not that there was a want of *jurisdiction* to make it. In other words, the order appointing the Receiver was reversed merely on the ground that jurisdiction was erroneously exercised. It is axiomatic that if a court has jurisdiction in a case it has the same power to decide erroneously as to decide correctly without exceeding its jurisdiction. *United States vs. Arredondo*, 6 Peters (U. S.), 691. Counsel have evidently confused the commission of mere error with an excess of jurisdiction. The two things are as far apart as the poles.

That this Court had power to appoint a Receiver under proper circumstances in a case of this impression no real question can be made. 1 Clark on Receivers, Section 238. This being so, it has authority to provide for his compensation either out of the fund administered or at the hands of the party procuring his appointment. *Atlantic Trust Company vs. Chapman*, 208 U. S. 360; *People vs. Oriental Bank*, 114 N. Y. Supp. 440; *Sullivan Lum-*

ber Company vs. Black, 48 So. Reporter 870; State of Texas vs. Palmer, 158 Fed. 705, (S. C.) 212 U. S. 131. The Receiver not having been appointed upon his own application is not to take the hazard of the propriety of such appointment. He becomes the arm of the court and it is the duty of the latter to see that his service is compensated. Nor does it necessarily follow that because his appointment was erroneously made the expense and compensation may not be directed to be paid out of the fund coming into his hands. (See cases above cited.) That depends upon the circumstances of the case. [384] As suggested, however, the question does not properly arise at this stage of the proceedings. But that the Court may direct the payment of the Receiver's accounts out of the fund in his hands in the first instance there is likewise no question. (See cases last cited.)

In this instance when the Receiver took charge of the mine he found it in the neighborhood of \$100,000.00, a little more or less, in debt. After administering it for a period of shortly over three years he has by honest and efficient management turned it back with the expenses of operation fully paid and with something in excess of \$600,000.00 in its treasury. Certainly the laborer is worthy of his hire. Who ultimately is to pay that hire may be reserved until it properly arises.

The exceptions are overruled and an order may be drawn approving and confirming the report of the Receiver and providing for the compensation of himself and his counsel; and that for the present

such compensation to be paid out of the balance of the fund left in his hands for the purpose.

[Endorsed]: Filed Sep. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [385]

(Title of Court and Cause.)

Order Confirming Fourth and Final Report and Account of Receiver and Allowing Compensation to Said Receiver and His Attorney.

The Court having heretofore on May 6th, 1921, on motion of R. T. Harding, solicitor for the defendants, ordered Walter B. Maling, Receiver herein, to turn over and deliver to the defendant, Presidio Mining Company, all of the property of said defendant in his possession, or under his control as such Receiver, except the sum of Five Thousand (5000) Dollars, which was to be retained by said Receiver in order to satisfy any balance of compensation and expenses in the receivership, including attorneys' fees which might be allowed him in his final account; and thereafter on the 27th day of May, one thousand nine hundred and twenty-one (1921), said Receiver having filed herein his fourth and final report and account of his administration covering the period from October 31st, 1920, to and including the time of said account, from which it appears that he has fully accounted for all of his receipts and disbursements during said time, and that he has delivered all of the property of every kind and nature taken possession of by him, and

the replacement thereof in cases where portions thereof have been consumed, and all funds and securities, except the said Five Thousand (5000) Dollars, and the offices, books and papers, both in California and in Texas, to said Presidio Mining Company; that he has paid out of said Five Thousand (5000) Dollars certain sums due to employees of said Receiver for salaries and expenses up to May 11th, 1921, amounting to [386] the sum of Five Hundred and Twenty-five (525) Dollars, and since said account, and on September 2d, 1921, he has paid the sum of Ten (10) Dollars clerk's fees, and has received as interest on the balance of said Five Thousand (5000) Dollars the sum of Fifty-nine and 68/100 (59.68) Dollars, leaving a balance of money now in his hands of Four Thousand Five Hundred and Twenty-four and 68/100 (4524.68) Dollars;

That it having been admitted by the parties to the action, through their respective counsel, on the hearing on said account and report, that said account and report was mathematically correct; and all objections and exceptions to said report and account made by the defendants herein having been heard by the Court and submitted for decision;

IT IS HEREBY ORDERED that all acts and things done by said Receiver, as well as said fourth and final report and account herein, be and they are hereby approved and confirmed, and that all objections and exceptions thereto are hereby disallowed.

It further appearing to the Court that said Receiver and his counsel have been paid no compensation since the 31st day of December, 1920; that said

balance of Four Thousand Five Hundred and Twenty-four and 68/100 (4524,68) Dollars is all the funds that are now in the hands of said Receiver; and that it is conceded by all parties to the action that the compensation and fees heretofore allowed said Receiver and his counsel in former accounts, viz: at the rate of Five Thousand (5000) Dollars per year each, is reasonable in amount;

IT IS FURTHER ORDERED that said balance now remaining in the hands of said Receiver be divided between the said Receiver and his counsel, Frank R. Wehe, that is to say: [387] That said Receiver pay to himself in full for Receiver's compensation since said last-mentioned date the sum of Two Thousand Two Hundred and Sixty-two and 34/100 (2262.34) Dollars and to Frank R. Wehe, his counsel, in full for counsel fees since said date a like sum of Two Thousand Two Hundred and Sixty-two and 34/100 (2262.34) Dollars; and that said Receiver be and he is hereby discharged and his bondsmen exonerated.

IT IS FURTHER ORDERED that all other questions raised by defendants on this hearing be and they are hereby postponed for determination until the hearing on the final decree herein.

Done in open court this 29th day of September one thousand nine hundred and twenty-one (1921).

WM. C. VAN FLEET,

Judge of said Court.

[Endorsed]: Filed Sep. 29, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[388]

In the Southern Division of the United States District Court for the Northern District of California, Southern Division.

IN EQUITY—No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,
vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT, and L. M. DOHERTY,
Defendants.

**Supplemental Account of Walter B. Maling,
Formerly Receiver Herein, Showing Disposition
of Money on Hand at Date of Decree of
Discharge on the 29th Day of September, 1921,
Including Trial Balance for Period Ending
on that Date.**

WALTER B. MALING, formerly Receiver herein, presents and files the following as supplemental to his final report and account herein:

That on the 29th day of September, one thousand nine hundred and twenty-one (1921), said Court entered a Decree discharging him as such receiver, at which time there was in his hands a balance of Four Thousand Five Hundred and Twenty-four and 68/100 (4,524.68) Dollars, as appears by said Decree.

That he disbursed said sums as follows:

He paid to himself in full for Receiver's compensation subsequent to the 31st day of December, one thousand nine hundred and twenty (1920), the sum of Two Thousand Two Hundred and Sixty-Two and 34/100 (2262.34) Dollars.

He paid to Frank R. Wehe, his counsel, in full for counsel fees for the same period the sum of Two Thousand Two Hundred [389] and Sixty-two and 34/100 (2262.34) Dollars.

That said disbursements, added to the payments theretofore made and money, securities and property turned over to the Presidio Mining Company, entirely exhausted the funds in his hands, and he has now fully accounted for all sums of money, securities and property ever held by him as such Receiver.

That immediately upon making said payments he caused a balance sheet for the period ending September 29th, 1921, and including said payments, to be made, a true copy of which is annexed hereto and marked Exhibit "A" and is filed herewith.

Respectfully submitted,

WALTER B. MALING.

FRANK R. WEHE,

Attorney for said Walter B. Maling. [390]

Exhibit "A."

WALTER B. MALING, RECEIVER
PRESIDIO MINING COMPANY.

Trial Balance for Period Ending September 29th,

1921.

	Supplies	\$35,873.13	61	Interest.	\$ 745.43
17	Mill	17,637.03	67	Exps at Mine—Mtls	143.43
121	Mine	11,161.52	71	Capital Stock	150,000.00
43	Fuel: Wood....	67.33	76	Profits & Loss.....	128,638.74
108	Fuel: Oil	7,007.25	81	W. S. Noyes, Tr.	105,903.88
<hr/>					
32	Mill	64,620.30	89	Surplus	374,943.69
37	Salary	2,100.00	98	Contgt a/cs Pay,	35,789.07
78	Rope Tramway	24,772.34	103	Resv for Deprn,	252,988.80
79	Surface Track	7,359.25	103	Resv for Depln,	110,845.08
82	Mine	175,099.32	104	Contgt Surplus	200,345.33

84	Taxes—Shafter	25.00	112	Bond Interest	8,973.72
87	Marfa Nat. Bk. Special a/c	17,230.27	117	Bullion	167,613.89
91	Mill Labor	15,337.50			
92	Expense Labor	5,181.35			
93	Ore Transportation—Labor	2,656.20			
96	Taxes—San Francisco	5,698.27			
98	Contgt a/cs Receivable ...	211,355.08			
99	Administration Expense...	625.00			
101	Anglo & London Paris Nat. Bk.	351.17			
102	Furniture & Fixtures.	341.50			
104	Permanent Improvements.	43,820.83			
105	Auditing	100.00			
105	Sundry Cap. Expenditures &	124,247.73			
106	Ore Transportation—Mtls.,	704.36			
109	Mine Labor	42,969.20			
111	Traveling Expenses,	100.00			

112	Receivership Expense	4,584.68
115	Assay Office	478.45
116	Automobile Expense	2,522.71
116	Team Expense	11.80
118	Mine Expense Matls.,	14,893.14
119	Liberty Loan Bonds	501,942.56
120	Mill Expense Matls	32,987.20
122	Plant, Bldgs & Equip.— Matls.	103,688.25
123	General Expense.	382.90
	Cash on hand:	94,871.74
	At San Francisco, 90257.77	
114	Superintendent..	4613.97

\$1,536,931.23

\$1,536,931.23

[Endorsed]: Filed Oct. 22, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [391]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 6th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 196—EQ.

W. S. OVERTON et al.

vs.

PRESIDIO MINING CO. et al.

(Order Directing Mandate to be Spread on Minutes.)

Upon motion of R. T. Harding, Esq., attorney for defendants herein, it is ordered that the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit, herein be filed and spread upon the minutes of this Court, which said Mandate is in the words and figures following, namely:
[392]

(Mandate.)

UNITED STATES OF AMERICA,—ss:

[Seal U. S. Circuit Court of Appeals.]

The President of the United States of America, to the Honorable the Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

WHEREAS, lately in the Southern Division of the District Court of the United States for the Northern District of California, Second Division, before you, or some of you, in a cause between W. S. Overton and Carl A. Martin, Complainants, and Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, defendants, No. 196, an interlocutory decree was duly filed and entered on the 16th day of February, A. D. 1918, and an order appointing Receiver was duly filed on the 20th day of February, A. D. 1918, which said interlocutory decree and order are of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of appeals prosecuted by Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, as appellants against W. S. Overton, and Carl A. Martin, on Behalf of Themselves and Other Minority Stockholders of the Presidio Mining Company Named in This Complaint, as appellees agreeably to the Act of Congress in such cases made and provided, [393] fully and at large appears:

AND WHEREAS, on the 21st day of May in the year of our Lord one thousand nine hundred and twenty, the said cause came on to be heard

before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly argued and submitted:

ON CONSIDERATION WHEREOF, it is now here ORDERED, ADJUDGED, AND DECREED by this Court, that that part of the interlocutory decree of the said District Court providing:

“That in and by said final decree the said William S. Noyes shall be ordered and directed within thirty (30) days from the date thereof to transfer said Section 5 to said Presidio Mining Company by proper deed free and clear of all liens and encumbrances”

will stand affirmed.

That part of the said decree relating to the payment of the purchase price of the property to William S. Noyes providing:

“That said William S. Noyes be credited with the purchase price of Section 5, together with interest thereon at the rate of seven per cent per annum from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of seven per cent per annum from the date of payments”

will stand affirmed.

That part of the said decree will run against the Presidio Mining Company and its officers and directors and will be as of the date of February 16, 1918. The [394] amount due thereon to be as-

certained by a reference to the accountants Klink, Bean & Co.

The final decree will also provide for the payment to William S. Noyes the amount due him under the lease of November 19, 1913, from January 25, 1913, to February 16, 1918. The amount to be ascertained by a reference to the accountants Klink, Bean & Co., with direction to extend and complete their schedules as they appear in the record and are there numbered, 4, 5, 6, 7, 8, and 9 so as to include in like manner but in a condensed form, all royalties due and payable to William S. Noyes for the years 1916, 1917 down to February 16, 1918.

In this computation Wm. S. Noyes will be charged with \$3,500, which we find was in effect paid to him on September 6, 1913, and was applied by his direction to make good a further shortage in the accounts of L. Osborn. This amount is included in the statement made by Noyes that up to December 31, 1915, he had received \$63,336.20. To the amount thus found due William S. Noyes under the lease of November 19, 1913, will be added the amount found due him on the purchase price of Section 5, and for the full sum so found due him the final decree will run against the Presidio Mining Company, its officers and directors. The said interlocutory decree of the said District Court in all other respects not herein mentioned will be reversed and set aside, the interlocutory injunction dissolved and the receiver discharged. The plain-

tiffs and defendants will each pay their own costs in this court.

(January 17, 1921.)

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court and as according to right and justice and the laws of the United States ought to be had, the said decree [395] and order of the said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 3d day of May, in the year of our Lord one thousand nine hundred and twenty-one.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Filed and spread on minutes of U. S. District Court, Northern District of California, the 6th day of May, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [396]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

PRIMARY SUIT.

No. 196—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Defendants.

In the District Court of the United States, for the
Western District of Texas, at El Paso.

AUXILIARY SUIT.

No. 114—EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Defendants.

**Order Authorizing Receiver to Deliver Property to
Defendant Presidio Mining Company.**

The Mandate from the United States Circuit
Court of Appeals for the Ninth Circuit in this case

having been presented and spread upon the minutes of this Court:

NOW, THEREFORE, on motion of R. T Harding, solicitor for the defendants (but said defendants not waiving directly or indirectly, but on the contrary expressly reserving all objections heretofore made to said receivership, and also the right to claim upon the coming in and settlement of the final account of said Receiver, and at all times and upon all [397] other occasions, that he, the said Receiver, must account for and return to the possession of said defendant corporation Presidio Mining Company, all of the property which has come into his hands as such Receiver without deduction for costs, judicial allowances, or expenses and/or Receiver's compensation, attorney's fees, commissions, or other charges of said receivership; and now, and at all times, insisting that all such charges must be paid by the complainants who have caused said Receiver to be appointed.) IT IS HEREBY ORDERED that Walter B. Maling, Receiver heretofore appointed, turn over and deliver to the defendant Presidio Mining Company all of the property of said defendant in his possession or under his control as such Receiver, except the sum of Five Thousand (\$5000) Dollars, which is to be retained by him in order to satisfy any balance of commissions ad expenses of the receivership, including attorney's fees, which may be allowed him in his final account.

That said Receiver take from said Presidio Mining Company such receipts and acknowledgments

as will evidence the payment and delivery of said property, and that he file herein a report and account of his receivership since his last report and account and present the same to this Court.

That immediately upon the entry of this order herein that the Clerk of this Court certify to a copy thereof and cause the same to be filed with the Clerk of the District Court of the United States for the Western District of Texas, at El Paso, in the auxiliary suit of Overton et al. vs. Presidio Mining Company, et al., No. 114—Equity.

Done in open court this 6th day of May, one thousand nine hundred and twenty-one (1921).

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May 6, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy clerk.
[398]

In the Southern Division of the United States
District Court for the Northern District of
California, Southern Division.

IN EQUITY—NO. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Defendants.

Petition for Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Given and Made in Said Cause and Court on September 29, 1921, by Honorable Wm. C. Van Fleet, Judge Thereof, and Filed in Said Cause and Court and With the Clerk of Said Court on Said September 29, 1921.

Now comes the above-named defendants and feeling themselves aggrieved by that certain order made and entered in the above-entitled cause and court, and entitled "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and his Attorney," given and made in said cause and court on September 29, 1921, by Honorable Wm. C. Van Fleet, Judge of said Court, and filed in said cause and court, and with the clerk of said [399] court, on said September 29, 1921, do hereby appeal from said order, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said defendants' assignments of errors, which is filed herewith, and they pray that this their appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth

Circuit, sitting at San Francisco, in the State of California.

And your petitioners further pray that the proper order touching the security to be required of them to perfect this appeal be made.

Dated at San Francisco this 27th day of March, 1922.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES,
B. S. NOYES,
L. OSBORN,
JOHN W. F. PEAT,
L. M. DOHERTY,

Said Defendants.

By R. T. HARDING and
HENRY E. MONROE,
Solicitors for said Defendants.

J. J. DUNNE.

Of Counsel for said Defendants.

[Endorsed]: Filed Mar. 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [400]

In the Southern Division of the United States
District Court for the Northern District of
California, Southern Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,

Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Assignment of Errors on Appeal from "Order Con-
firming Fourth and Final Report and Account
of Receiver, and Allowing Compensation to
Said Receiver and His Attorney," and from
Memorandum Opinion.**

Now, on the 27th day of March, 1922, come the
defendants, Presidio Mining Company, a corpora-
tion, Wm. S. Noyes, B. S. Noyes, L. Osborn, John
W. F. Peat and L. M. Doherty, by their solicitors,
R. T. Harding and Henry E. Monroe, and say that
there is manifest error on the face of the record in
the above-entitled suit, and that the Memorandum
Opinion filed herein on the 29th day of September,
1921, is erroneous, and that the "Order Confirming
Fourth and Final Report and Account of Receiver,
and Allowing Compensation to said Receiver and

his Attorney" made and entered in said suit on the 29th day of September, 1921, is erroneous and unjust to these defendants, and defendants hereby assign the making, giving [401] and entering of said Memorandum Opinion and of said order herein as error, for the following reasons, and now make, file and present the following assignments of error upon which they and each of them will rely, as follows, to wit:

EXCEPTION I.

That the Court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the Receiver herein shall be charged to the plaintiffs, who procured his appointment, does not arise, and was not properly presented to the Court, upon the hearing for the settlement of receiver's final report and account.

EXCEPTION II.

That the Court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the Receiver herein shall be charged to the plaintiffs, who procured his appointment, "will more properly arise on a motion to tax the costs upon the entry of the final decree."

EXCEPTION III.

That the Court erred in finding and decreeing in said memorandum opinion and in said order that under the circumstances of this case the Court may direct the payment of the Receiver's account out of the fund in his hands in the first instance.

EXCEPTION IV.

That the Court erred in finding and decreeing in

said memorandum opinion that it had authority to provide for the compensation of the Receiver and his attorney out of the fund administered; and this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States [402] Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that Court), that there was no necessity for the appointment of a Receiver in this cause, and that the appointment of said Receiver was improper and illegal.

EXCEPTION V.

That the Court erred in finding and decreeing in said memorandum opinion that it had authority to provide for the compensation of the Receiver and his attorney out of the fund administered; and that this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that Court), that this Court had no power to appoint a Receiver in this cause, and that the appointment of said Receiver was improper and illegal.

EXCEPTION VI.

That the Court erred in and by said memorandum opinion and/or order in overruling the defendants' exceptions and objections to the fourth and final report and account of Receiver, and allowing compensation to said Receiver and his attorney.

EXCEPTION VII.

That the Court erred in finding and decreeing that when the Receiver took charge of the mine of the defendant, Presidio Mining Company that he found it in the neighborhood of \$100,000.00, a little more or a little less, in debt; instead of finding and decreeing that said Presidio Mining Company had at the time the Receiver took charge of said mine, a total of net liquid assets in excess of \$100,000.00, over and above all debts and liabilities. [403]

EXCEPTION VIII.

That the Court erred in finding and decreeing in and by said memorandum opinion that the Receiver after administering said mine for a period of shortly over three years, turned it back with the expenses of operation fully paid and with something in excess of \$600,000.00 in the treasury of said Presidio Mining Company, without also finding that there was due and owing from the Presidio Mining Company to Wm. S. Noyes under the lease of November 19, 1913, the sum of approximately \$154,000.00, in accordance with the final judgment or decree of the United States Circuit Court of Appeals for the Ninth Circuit: and without also finding that at the time the Receiver took charge of said mine there was turned over to said Receiver, in liquid assets in money, liberty bonds and mining supplies of the net value of \$192,279.99.

EXCEPTION IX.

That the Court erred in ordering in and by the "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation

to said Receiver and his Attorney," that all acts and things done by said Receiver, as well as the said fourth and final report and account herein, be approved and confirmed, and that all objections and exceptions of the defendants thereto be disallowed.

EXCEPTION X.

That the Court erred in ordering, in and by the "Order Confirming Fourth and Final Report and Account of Receiver and his Attorney," that the balance then remaining in the hands of the Receiver, to wit, the sum of \$4524.68, be divided between said Receiver and his counsel, Frank R. Wehe, and that said Receiver be discharged, and his bondsmen exonerated. [404]

EXCEPTION XI.

That the Court erred in ordering in and by the "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and his Attorney," that all other questions raised by the defendants on the hearing of the fourth and final report and account of the Receiver be postponed, for determination, until the hearing on the final decree herein.

EXCEPTION XII.

That the Court erred in overruling the objections and exceptions of the defendants to the allowance to said Receiver of the following items and amounts contained in the first report and account of said Receiver filed herein on the 2d day of November, 1918, and in a supplemental report thereto filed herein on the 28th day of December, 1918, to wit:

\$4270.76 paid to Walter B. Maling, as Receiver's fees.

\$4270.76 paid to Frank R. Wehe on account of attorney's fees.

\$70.00 Court fees.

\$4500.00 paid to F. C. Handy, Receiver's Assistant at Shafter, Texas, ten months at \$450 per month.

\$988.33 paid to Receiver's bookkeeper at varying rates.

\$50.00 paid for premium on Receiver's bond.

\$579.25 paid for traveling expenses from San Francisco to the mine at Shafter, Texas, and return for W. B. Maling, F. R. Wehe and F. C. Handy.

EXCEPTION XIII.

That the Court erred in overruling the objections and exceptions of the defendants to the allowance to said Receiver of the following items and amounts contained in the second report and account of said Receiver filed herein on the 10th day of December, [405] 1919, to wit:

\$5000.00 paid to Walter B. Maling, as Receiver's fees.

\$5000.00 paid to Frank R. Wehe as attorney's fees for said Receiver.

\$5400.00 paid to F. C. Handy, Receiver's Assistant at Shafter, Texas.

\$1225.00 paid to Receiver's bookkeeper.

\$50.00 paid on account of premium on Receiver's bond.

\$546.56 traveling expenses of W. B. Maling, F. R. Wehe and F. C. Handy.

\$3679.40 paid to Haskins & Sells, certified accountants.

\$2500.00 as fees paid to the Master in Chancery herein.

EXCEPTION XIV.

That the Court erred in overruling the objections and exceptions of the defendants to the allowance to said Receiver of the following items and amounts contained in the third report and account of said Receiver filed herein on the 30th day of November, 1920, to wit:

\$5000.00 paid to Walter B. Maling, as Receiver's fees.

\$5000.00 paid to Frank R. Wehe, as attorney's fees for said Receiver.

\$5400.00 paid to F. C. Handy as Receiver's Assistant at Shafter, Texas.

\$1500.00 paid to Receiver's bookkeeper.

\$50.00 paid as premium on Receiver's bond.

EXCEPTION XV.

That the Court erred in overruling the objections and exceptions of the defendants to the allowance to said Receiver of the following items and amounts contained in the fourth and final [406] report and account of Receiver filed herein on the 27th day of May, 1921, to wit:

\$2100.00 paid to F. C. Handy, the Receiver's assistant at Shafter, Texas.

\$500.00 paid to receiver's bookkeeper.

\$50.00 paid on account of premium on receiver's bond.

EXCEPTION XVI.

That the Court erred in not ordering and adjudging that the Receiver must return to the defendants all the property which came into his possession as such Receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendants, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business.

EXCEPTION XVII.

That the Court erred in not ordering and adjudging that the Receiver must return to the defendants all the property which came into his possession as such Receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business, but that said Receiver have judgment against the complainants for the full amount of costs and expenses of the receivership herein.

EXCEPTION XVIII.

That the Court erred in ordering and adjudging that the costs and expenses of the receivership be paid out of the funds in the hands of the Receiver in the first instance, and in not also ordering and adjudging that the Presidio Mining Company and/or [407] the defendants have judgment against the complainants for the full amount of the costs and expenses of the receivership.

EXCEPTION XIX.

That the Court erred in not sustainig and/or allowing the objections and exceptions of the defendants to the fourth and final report and account of Receiver, and each and all of the objections and exceptions to each and all of the preceding reports and accounts of said Receiver.

WHEREFORE, the defendants pray that said "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and his Attorney," be reversed and set aside and that the District Court be directed to sustain the objections and exceptions of the defendants to said fourth and final report and account of the Receiver, and to all preceding reports and accounts of the Receiver, and that said Receiver be directed to return to the defendants all property which came into his possession as such Receiver without deductions for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business; and that said Receiver have judgment against the complainant for the full amount of costs and expenses of the receivership herein; or that said District Court be directed to sustain the objections and exceptions of the defendants to said fourth and final report and account of the Receiver and to all preceding reports and accounts of the Receiver, and that said District Court be directed to ascertain and determine the full sum

or amount of the costs and expenses of said receivership by deducting from the full amount of the expenditures and [408] payments made by the Receiver, including his own compensation and that of his attorney, the expenditures which the Presidio Mining Company would have been compelled to make in the usual and ordinary conduct of its mining business, and that said District Court be further ordered and directed to enter a judgment in favor of the defendant, the Presidio Mining Company and against the complainants for the difference, that is, for the costs and expenses of said receivership, and that said defendants or either or any of them may have such further relief as may seem meet and equitable.

R. T. HARDING and
HENRY E. MONROE,
Solicitors for Defendants.

J. J. DUNNE,
Of Counsel.

[Endorsed]: Filed Mar. 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [409]

In the Southern Division of the United States
District Court for the Northern District of
California, Southern Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,
vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,
Defendants.

**Order Allowing Appeal from "Order Confirming
Fourth and Final Report and Account of Re-
ceiver, and Allowing Compensation to Said
Receiver and His Attorney," Made, Entered
and Filed in the Above-entitled Cause and
Court on September 29, 1921, and Fixing
Amount of Bond.**

This day came Presidio Mining Company, a cor-
poration, Wm. S. Noyes, B. S. Noyes, L. Osborn,
John W. F. Peat, and L. M. Doherty, defendants in
the above-entitled action, appearing by R. T. Hard-
ing, Esquire, and Henry E. Monroe, Esquire, their
solicitors of record, and presented their petition for
an appeal from that certain order entitled "Order
Confirming Fourth and Final Report and Account
of Receiver, and Allowing Compensation to Said
Receiver and His Attorney," made, entered and

filed in the above-entitled cause and court on September 29, 1921, and their assignment [410] of errors accompanying the said petition, which said petition, upon due consideration, is hereby allowed, and an appeal from the aforesaid order is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of Five Hundred (500) Dollars, with good and sufficient surety to be approved by the court; and it is hereby further ordered that a complete transcript of all records, proceedings and papers upon which the aforesaid order was based, duly authenticated, be certified and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 27th day of March, 1922.

WM. C. VAN FLEET,
Judge of Said Court.

[Endorsed]: Filed Mar. 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [411]

(Title of Court and Cause.)

Cost Bond on Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to Said Receiver and His Attorney," Made, Entered and Filed in Said Cause and Court on September 29, 1921.

WHEREAS, the above-named Presidio Mining Company, a corporation, Wm. S. Noyes, B. S.

Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse that certain order entitled "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and his Attorney," made, entered and filed in said cause and court on September 29, 1921;

NOW, THEREFORE, in consideration of the premises, the undersigned, National Surety Company, a corporation, duly organized and existing under the laws of the State of New York, and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of said defendants, Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, and L. M. Doherty, that said defendants will prosecute their said appeal to effect and answer all costs if they fail to make good their plea and appeal, not exceeding the sum of Five Hundred (\$500) Dollars to which amount it acknowledges itself justly bound. [412]

Dated at San Francisco, California, this 27th day of March, A. D. 1922.

[Seal] NATIONAL SURETY COMPANY,

By F. J. CRISP,

Resident Vice-President.

By A. C. ROBESON,

Resident Assistant Secretary.

Approved this 27th day of March, 1922.

WM. C. VAN FLEET,
Judge of the Above-entitled Court.

[Endorsed]: Filed Mar. 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [413]

In the District Court of the United States, in and
for the Northern District, Southern Division,
Second Division.

IN EQUITY—No. 196.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT and L. M.
DOHERTY,

Defendants.

**Defendants' Praecept on Appeal From Order Con-
firming Fourth and Final Report and Account
of Receiver, and Allowing Compensation to
Said Receiver and His Attorney.**

To the Clerk of the Above-entitled Court:

Sir: You will please prepare transcript of
record in the above-entitled cause, to be in the
office of the Clerk of the United States Circuit
Court of Appeals for the Ninth Judicial Circuit,
pursuant to the appeal heretofore allowed herein

and perfected to said Court from the "Order Confirming Fourth and Final Report and Account of Receiver and Allowing Compensation to said Receiver and His Attorney" and decree of said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit: [414]

- (1) Order of the Hon. Wm. H. Hunt, United States Circuit Judge, and One of the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, Made in the Matter of This Appeal on the 20th Day of April, 1922, a Copy of Which is Hereto Attached and Made a Part of This Praeceptum.
- (2) The First Report and Account of the Receiver Herein. Filed Nov. 2, 1918.
- (3) The Supplement to Said First Report and Account of Said Receiver. Filed Dec. 28, 1918.
- (4) Stipulation Allowing Fees of Receiver and His Attorney, and Order Attached Thereto. Filed Dec. 11, 1918.
- (5) Second Report and Account of the Receiver. Filed Dec. 10, 1919.
- (6) Defendants' Objections to Receiver's Second Account. Filed Dec. 22, 1919.
- (7) Order Allowing and Confirming Said Second Account of Said Receiver. Made Jan. 13, 1920.
- (8) Third Report and Account of the Receiver Herein. Filed Nov. 30, 1920.

- (9) Objections of Defendants to the Allowance of, and to Settlement of, Receiver's Account. Filed Dec. 4, 1920.
- (10) Order Allowing and Confirming Said Third Report and Account of Said Receiver. Filed Dec. 4, 1920.
- (11) Mandate of the United States Circuit Court of Appeals, and Order Directing Same to be Spread on the Minutes of This Court Made and Filed May 6, 1921.
- (12) Order Allowing Receiver to Deliver Possession of Property in Advance of Final Discharge.
- (13) Fourth and Final Report and Account of Receiver.
- (14) Defendants' Exceptions and Objections to Said Fourth and Final Report and Account of Receiver. Filed June 3, 1921. [415]
- (15) Memorandum Opinion of Court on Overruling Defendants' Objections and Exceptions to Said Account of Receiver. Filed Sept. 28, 1921.
- (16) Order Overruling Defendants' Objections and Exceptions to Receiver's Fourth and Final Account, and Confirming Said Account of Receiver, and Allowing Fees to Said Receiver and His Attorney.
- (17) Supplemental Account of Said Receiver.
- (18) Defendants' Petition for Appeal From Order Confirming Fourth and Final Report of Receiver.

- (19) Defendants' Assignments of Error on Appeal From Said Last-Mentioned Order.
- (20) Cost Bond on Appeal From Said Last-Mentioned Order.
- (21) Citation on Appeal From Said Last-Mentioned Order.
- (22) Order Allowing Appeal From Said Last-Mentioned Order and Fixing Bond on Appeal.
- (23) This Praecipe.
- (24) Affidavit of R. T. Harding of Service of Citation on Walter B. Maling, Receiver.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and filed in the office of the Clerk of the United States Circuit Court of Appeals, on or before the 26th day of June, 1922, in accordance with the stipulation and order, a copy of which is hereto annexed. [416]

Dated at San Francisco, California, this 27th day of April, A. D. 1922.

PRESIDIO MINING COMPANY.

WM. S. NOYES,
B. S. NOYES,
L. OSBORN,
JOHN W. F. PEAT,
L. M. DOHERTY,

Said Defendants and Appellants Herein.

By R. T. HARDING and
HENRY E. MONROE,

Their Solicitors.

J. J. DUNNE,

Of Counsel. [417]

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

No. — .

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, JOHN W.
F. PEAT, and L. M. DOHERTY,
Defendants and Appellants,
vs.

W. S. OVERTON and CARL A. MARTIN,
Complainants and Appellees.

**Stipulation as to Printing of Record on Appeal
(Copy)**

IT IS HEREBY STIPULATED by and
between the parties in the above-entitled cause
and Walter B. Maling, the Receiver in the above-
entitled cause, which cause is in Equity—No. 196,
in the District Court of the United States, for the
Southern District of California, Northern Division,
that in the matter of the appeal of the above-named
defendants and appellants from “Order Confirming
Fourth and Final Report and Account of Receiver,
and Allowing Compensation to said Receiver and
His Attorney,” given and made in said District
Court on September 29, 1921, and filed in said
cause, in said District Court, and with the Clerk
of said Court on September 29, 1921, that none of
the pleadings, papers, or matters printed and con-
tained in the Transcript of Record in this cause
in the former appeal herein, being No. 3253 in this

Court, need be included in, or printed in the Transcript of Record on this Appeal: but that all pleadings, papers, and matters printed in the Transcript of Record on said former appeal, No. 3253, in this court, [418] may be referred to and used on this appeal with the same force and effect as if the same were printed in the Transcript of Record on this Appeal.

Dated this 19th day of April, A. D. 1922.

R. T. HARDING and

HENRY E. MONROE,

Solicitors for Defendants and Appellants.

J. J. DUNNE,

Of Counsel.

WM. F. ROSE,

Solicitor for Complainants and Appellees.

FRANK R. WEHE,

Formerly Solicitor for said Receiver.

It is so ordered.

Dated April 20, A. D. 1922.

W. H. HUNT,

United States Circuit Judge. [419]

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, JOHN W.
F. PEAT, and L. M. DOHERTY,

Defendants and Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Complainants and Appellees.

**Stipulation and Order Enlarging Time to File
Transcript of Record on Appeal and to Docket
Said Cause in the Matter of the Appeal from
"Order Confirming Fourth and Final Report
and Account of Receiver, and Allowing Com-
pensation to Said Receiver and His Attorney,"
Given and Made in Said Cause on September
29, 1921, Which Said Cause is No. 196 in Equity,
in the Southern Division of the United States
District Court of the Northern District of Cali-
fornia, Southern Division.**

IT IS HEREBY STIPULATED by and be-
tween the respective parties, as follows, to wit:

That the return day of the citation on the above-
mentioned appeal to the United States Circuit Court
of Appeals for the Ninth Circuit, in the above-men-
tioned suit, be, and the same is, hereby enlarged
and extended up to and including the 26th day of
June, 1922, and that the defendants and appellants
may have to and including the 26th day of June,
1922, in which to file in the office of the Clerk of the

above-entitled court their Transcript of the Record on Appeal, and to docket said cause in said court; appellees, however, [420] not admitting that the appellants have any right af appeal from said order, and reserving the right to move to dismiss said appeal.

Dated this —— day of April, 1922.

R. T. HARDING,
HENRY E. MONROE,

Solicitor for Defendants and Appellants.

J. J. DUNNE,

Of Counsel.

WM. F. ROSE,

Solicitor for Complainants and Appellees.

FRANK R. WEHE,

Formerly Solicitor for Receiver.

Upon reading the foregoing stipulation, IT IS HEREBY ORDERED that the return day of the citation on the above-mentioned appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-mentioned suit, be, and the same is, hereby enlarged and extended up to and including the 26th day of June, A. D. 1922, and that defendants and appellants may have to and including the 26th day of June, 1922, in which to file in the office of the Clerk of this court their Transcript of the Record on Appeal, and to docket said cause in this court.

Dated this 21st day of April, 1922.

W. H. HUNT,

United States Circuit Judge. [421]

Due service of a copy of the within praecipe is hereby admitted this 29th day of April, 1922.

WM. F. ROSE,
Solicitor for Complainants.

FRANK R. WEHE,
Formerly Solicitor for Receiver.

[Endorsed]: Filed May 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[422]

(Title of Court and Cause.)

**Complainants' Praecipe on Defendants' Appeal
From Order Confirming Fourth and Final Report and Account of Receiver, and Allowing
Compensation to Said Receiver and His
Attorney.**

To the Clerk of the Above-entitled Court:

SIR: In connection with defendants' appeal above indicated, please prepare complainants' suggested documents herein indicated to be used and made a part of the record in the United States Circuit Court of Appeals for the Ninth Judicial Circuit and prepare a transcript of record to include the following:

1. Motion for Injunction and Receivership, Dated Oct. 5, 1915. Filed Oct. 7, 1915.
2. Affidavits W. S. Overton Dated July 26, and 27, 1915. Filed —, 1915.
3. Supplemental Affidavits W. S. Overton, Dated Oct. 4 and 6, 1915, and Affidavits F. H. Gar-

- diner and E. A. Herger, Dated Dec. 4 and 6, 1915. Filed Dec. 6, 1915.
4. Reply Affidavit W. S. Noyes, Dated Dec. 16, 1915, and Reply Affidavit B. S. Noyes, Dated Dec. 16, 1915. Filed Dec. 16, 1915.
5. Memorandum Court Minute Order Dec. 28, 1915, Ordering Injunction Denying Receivership Without Prejudice. Filed Dec. 28, 1915.
6. Motion for Order to Inspect Books and Records: and Affidavit of W. S. Overton in Support of [423] motion. Filed Jan. 25, 1916.
7. Order to Inspect Books and Records. Filed Feb. 11, 1916.
8. Motion for Temporary Injunction Supporting Affidavits, Temporary Restraining Order. Filed Oct. 26, 1916.
9. Injunction and Bond on Same, Restraining Transfer of Stock. Filed Dec. 11, 1916.
10. Bond on Appointment of Receiver on Behalf of Complainants. Filed Feb. 20, 1918.
11. Complainants' Answer to Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver. Filed June 30, 1921.
12. Stipulation Re Employment F. C. Handy and Miss Florence Handy, Signed by Complainants and Defendants (Affidavit Mr. Maling). Filed Aug. 5, 1921.
13. Stipulation and Letter by R. T. Harding, Esq., to Judge Van Fleet with Authority that W. B. Maling is Qualified to Act as Receiver and

Suggested Same on Behalf of Defendants.
Filed Feb. —, 1918.

14. Order to Invest \$50,000 Liberty Bonds and \$10,000 Liberty Bonds by Receiver. Filed Apr. 8, 1918.
15. Petition, Stipulation and Order for New Engine. Filed June 3, 1918.
16. Petition for Audit Filed by Receiver. Filed Dec. 2, 1918.
17. Order to Employ Auditor. Filed Jan. 13, 1919.
18. Stipulation Inviting Judge to Visit Mine. Filed Feb. 27, 1919. [424]
19. T. W. Thompson's Report for 1920, Submitted to Receiver's Attorney and Receiver. Filed Nov. —, 1920.
20. Report of Haskins & Sells. Filed —, 1919.
21. Report of the Master in Chancery on Accounting. Filed Nov. 30, 1918.
22. This Praecipe.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the United States Circuit Court of Appeals as required by law in such cases made and provided.

Dated: San Francisco, Cal., May 4, 1922.

W. S. OVERTON and

CARL A. MARTIN,

Complainants and Appellees Herein.

By WM. F. ROSE,

Their Solicitor.

CHARLES CLYDE SPICER,

Of Counsel.

Copy of within praecipe received this 5th day of
May, 1922.

R. T. HARDING and

HENRY E. MONROE,

Attorneys for Defendants.

FRANK R. WEHE,

By C. R. JOHNSON,

Formerly Attorney for Receiver.

[Endorsed]: Filed May 5, 1922. Walter B.
Maling, Clerk. [425]

(Title of Court and Cause.)

**Affidavit of R. T. Harding on Service of Citation
on Appeal.**

State of California,

City and County of San Francisco,—ss.

R. T. Harding, being duly sworn, deposes and
says:

That he is one of the solicitors for the defendants
in the above-entitled cause:

That on the 28th day of March, 1922, he served
the "Citation on Appeal from 'Order Confirming

Fourth and Final Report and Account of Receiver and Allowing Compensation to said Receiver and His Attorney,' made, entered and filed in the above-entitled cause and court on September 29, 1921'' (which said citation was made and issued in the above-entitled cause and court by the Hon. Wm. C. Van Fleet, the Judge of said court, on the 27th day of March, 1922), on Walter B. Maling, Receiver in the above-entitled cause, on the 28th day of March, 1922, in the manner following:

The said Walter B. Maling was absent from his office in the United States Post Office Building in the City and County of San Francisco, State of California, on said 28th day of March, 1922, but on said day the said Walter B. Maling was at the City of Sacramento, in said State, and this affiant made service of said Citation upon him by delivering to and leaving with J. A. Schaertzer, the person then in charge of the office of the said Walter B. Maling, a full, true and correct copy of said Citation, and by exhibiting to the said J. A. Schaertzer, the original citation: and this affiant also made service of said Citation upon the said Walter B. Maling by [426] leaving a full, true and correct copy of said Citation at the residence of the said Walter B. Maling, at No. 1001 Pine Street, in the city and county of San Francisco, on said 28th day of March, 1922, between the hours of eight in the morning and six in the evening, by delivering to and leaving with Dorothy Maling, a person of not less than eighteen years of age, said copy of said Citation. That at

said time the said Dorothy Maling was the only person at and in charge of said residence.

Affiant further states that he also served said citation upon the said Walter B. Maling, by depositing in the United States postoffice, a full, true and correct copy of said Citation, on said 28th day of March, 1922; that said copy of said Citation was enclosed in an envelope with postage prepaid thereon and addressed to the said Walter B. Maling, No. 1001 Pine Street, San Francisco, California.

That this affiant did also, on said 28th day of March, 1922, at the city and County of San Francisco, state of California, serve said Citation upon Frank R. Wehe, the attorney for said Receiver in the above-entitled cause, by delivering to and leaving with the said Frank R. Wehe, personally, a full, true and correct copy of said Citation, and by exhibiting to him the original Citation.

That said Frank R. Wehe declined to admit due service and receipt of a copy of the said Citation as the attorney of said Receiver, but in lieu thereof indorsed on said original Citation the following: "Received a copy of the within Citation is hereby admitted this 28th day of March, A. D. 1922." (Signed) "Frank R. Wehe, Attorney for Receiver during all the times up to time of his discharge."

R. T. HARDING.

Subscribed and sworn to before me this 28th day of March, A. D. 1922.

[Seal]

M. A. BRUSIE,
Notary Public in and for the City and County of
San Francisco, State of California. [427]

[Endorsed]: Filed Mar. 28, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[428]

(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing four hundred twenty-eight (428) pages, numbered from 1 to 428, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$206.00; that said amount was paid by the defendants; and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of July, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [429]

In the Southern Division of the United States District Court for the Northern District of California, Southern Division.

No. 196—IN EQUITY.

W. S. OVERTON and CARL A. MARTIN,
Complainants,

vs.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, L. OS-
BORN, JOHN W. F. PEAT, and L. M.
DOHERTY,

Defendants.

Citation on Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and His Attorney," Made, Entered and Filed in the Above-Entitled Cause and Court on September 29, 1921.

United States of America to W. S. Overton and Carl A. Martin, Complainants Herein, and Wm. F. Rose, Their Solicitor, and to Walter B. Maling, the Receiver Herein, and Frank R. Wehe, Attorney for the Receiver:

You are hereby notified that in the above-entitled cause an appeal has been allowed the defendants Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, and L. M. Doherty, to the United States Circuit Court of Appeals for the Ninth Circuit from that

certain order entitled "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation [430] to said Receiver and His Attorney," given, made, entered and filed in the above-entitled cause and court on September 29, 1921.

You are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, thirty days after the date of this citation, to show cause, if any there be, why said order appealed from should not be corrected and speedy justice done the parties in that behalf.

Dated, San Francisco, March 27th, 1922.

WM. C. VAN FLEET,
Judge of Said Court.

[Endorsed]: No. 196—In Equity. In the Southern Division of the United States District Court for the Northern District of California, Southern Division. W. S. Overton and Carl A. Martin, Complainants, vs. Presidio Mining Company, a Corporation, et als., Defendants. Citation on Appeal from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver," etc. Filed Mar. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within Citation is hereby admitted this 27th day of March, A. D. 1922.

WM. F. ROSE,
Solicitor for Complainants.

Receipt of a copy of the within citation is hereby admitted this 28th day of March, A. D. 1922.

FRANK R. WEHE,
Attorney for Receiver During All Times Up to
Time of His Discharge.

[Endorsed]: No. 3896. United States Circuit Court of Appeals for the Ninth Circuit. Presidio Mining Company, a Corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, and L. M. Doherty, Appellants, vs. W. S. Overton and Carl A. Martin, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Southern Division.

Filed July 22, 1922.

F. D. MONCKTON,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

No.—.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, JOHN F.
W. PEAT, and L. M. DOHERTY,

Defendants and Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Complainants and Appellees.

**Stipulation as to Printing of Record on Appeal
(Original).**

IT IS HEREBY STIPULATED by and between the parties in the above-entitled cause and Walter B. Maling, the Receiver in the above-entitled cause, which cause is in Equity, No. 196, in the District Court of the United States, for the Southern District of California, Northern Division, that in the matter of the appeal of the above-named defendants and appellants from "Order Confirming Fourth and Final Report and Account of Receiver, and Allowing Compensation to said Receiver and His Attorney," given and made in said District Court on September 29, 1921, and filed in said cause, in said District Court, and with the Clerk of said court on September 29, 1921, that none of the pleadings, papers, or matters printed and contained in the Transcript of Record in this cause in the former appeal herein, being No. 3253 in this court, need be included in, or printed in the Transcript of Record on this Appeal; but that all pleadings, papers, and matters printed in the Transcript of Record on said former appeal, No. 3253, in this court, may be referred to and used on this appeal with the same force and effect as if the same were printed in the Transcript of Record on this Appeal.

Dated this 19th day of April, A. D. 1922.

R. T. HARDING and
HENRY E. MONROE,

Solicitors for Defendants and Appellants.

J. J. DUNNE,
Of Counsel.

WM. F. ROSE,
Solicitor for Complainants and Appellees.

FRANK H. WEHE,
Former Solicitor for said Receiver.

It is so ordered.

Dated April 20, A. D. 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3896. In the United States Circuit Court of Appeals, for the Ninth Circuit. Presidio Mining Company, a Corporation, et al., Defendants and Appellants, vs. W. S. Overton et al., Complainants and Appellees. Stipulation as to Printing of Record on Appeal. Filed Apr. 21, 1922. F. D. Monckton, Clerk. Refiled Jul. 22, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, JOHN W.
F. PEAT, and L. M. DOHERTY,

Defendants and Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Complainants and Appellees.

Stipulation and Order Extending Time to and Including June 26, 1922, to File Record and Docket Cause.

STIPULATION AND ORDER ENLARGING TIME TO FILE TRANSCRIPT OF RECORD ON APPEAL AND TO DOCKET SAID CAUSE IN THE MATTER OF THE APPEAL FROM "ORDER CONFIRMING FOURTH AND FINAL REPORT AND ACCOUNT OF RECEIVER, AND ALLOWING COMPENSATION TO SAID RECEIVER AND HIS ATTORNEY," GIVEN AND MADE IN SAID CAUSE ON SEPTEMBER 29, 1921, WHICH SAID CAUSE IS NO. 196 IN EQUITY, IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

IT IS HEREBY STIPULATED by and between the respective parties, as follows, to wit:

That the return day of the citation on the above-mentioned appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-mentioned suit, be, and the same is, hereby enlarged and extended up to and including the 26th day of June, 1922, and that the defendants and appellants may have to and including the 26th day of June, 1922, in which to file in the office of the Clerk of the above-entitled court their Transcript of the Record on Appeal, and to docket said cause

in said Court; appellees, however, not admitting that the appellants have any right of appeal from said order, and reserving the right to move to dismiss said appeal.

Dated this 21st day of April, 1922.

R. T. HARDING and
HENRY E. MONROE,

Solicitors for Defendants and Appellants.

J. J. DUNNE,

Of Counsel.

WM. F. ROSE,

Solicitor for Complainants and Appellees.

FRANK R. WEHE,

Former Solicitor for Receiver.

Order.

Upon reading the foregoing stipulation, IT IS HEREBY ORDERED that the return day of the citation on the above-mentioned appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-mentioned suit, be, and the same is, hereby enlarged and extended up to and including the 26th day of June, A. D. 1922, and that defendants and appellants may have to and including the 26th day of June, 1922, in which to file in the office of the Clerk of this Court their Transcript of the Record on Appeal, and to docket said cause in this court.

Dated this 21st day of April, 1922.

W. H. HUNT,

United States Circuit Judge.

[Endorsed]: 3896. In the United States Circuit Court of Appeals, for the Ninth Circuit. Presidio

Mining Company, a Corporation, et al., Defendants and Appellants, vs. W. S. Overton and Carl A. Martin, Complainants and Appellees. Stipulation and Order Enlarging Time to File Transcript of Record on Appeal and to Docket Cause, etc. Filed Apr. 21, 1922. F. D. Monckton, Clerk. Re-filed Jul. 22, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

PRESIDIO MINING COMPANY, a Corporation,
WM. S. NOYES, B. S. NOYES, JOHN W.
F. PEAT, and L. M. DOHERTY,
Defendants and Appellants,
vs.

W. S. OVERTON and CARL A. MARTIN,
Complainants and Appellees.

**Order Enlarging Time to and Including August 26,
1922, to File Record and Docket Cause.**

ORDER ENLARGING TIME TO FILE TRAN-
SCRIPT OF RECORD ON APPEAL AND
TO DOCKET SAID CAUSE IN THE MAT-
TER OF THE APPEAL FROM "ORDER
CONFIRMING FOURTH AND FINAL RE-
PORT AND ACCOUNT OF RECEIVER,
AND ALLOWING COMPENSATION TO
SAID RECEIVER AND HIS ATTORNEY,"
GIVEN AND MADE IN SAID CAUSE ON
SEPTEMBER 29, 1921, WHICH SAID

CAUSE IS NO. 196 IN EQUITY, IN THE
SOUTHERN DIVISION OF THE UNITED
STATES DISTRICT COURT OF THE
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

Good cause appearing, IT IS HEREBY ORDERED that the return day of the Citation on the above-mentioned appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-mentioned suit, be, and the same is, hereby enlarged and extended up to and including the 26th day of August, 1922, and that defendants and appellants may have to and including the 26th day of August, 1922, in which to file in the office of the Clerk of this Court their Transcript of the Record on Appeal, and to docket said cause in this court.

Dated this 24th day of June, 1922.

W. H. HUNT,

United States Circuit Judge.

[Endorsed]: 3896. In the United States Circuit Court of Appeals, for the Ninth Circuit. Presidio Mining Company, a Corporation, et al., Defendants and Appellants, vs. W. S. Overton, et al., Complainants and Appellees. Order Enlarging Time to File Transcript of Record and Docket Cause on Appeal. Filed Jun. 24, 1922. F. D. Monckton, Clerk. Re-filed Jul. 22, 1922. F. D. Monckton, Clerk.

No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM.
S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F.
PEAT, and L. M. DOHERTY,

Appellants,

VS.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

BRIEF FOR APPELLANTS.

R. T. HARDING,

HENRY E. MONROE,

Solicitors for Appellants.

J. J. DUNNE,

Of Counsel.

FILED

OCT 10 1922

F. D. MONCKTON,
CLERK.

No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), Wm.
S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F.
PEAT, and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

BRIEF FOR APPELLANTS.

General Statement.

The present appeal grows out of the litigation in which the Presido Mining Company, its officers and directorate, have, for the last six or seven years, unfortunately been involved. This litigation has heretofore been before this court and also before the Supreme Court of the United States: in that litigation, a receiver was appointed, but subsequently discharged; and the present phase of the litigation involves the liability for the loss to the company accruing from the receivership.

ASSIGNMENT OF ERRORS ON APPEAL FROM "ORDER CONFIRMING FOURTH AND FINAL REPORT AND ACCOUNT OF RECEIVER, AND ALLOWING COMPENSATION TO SAID RECEIVER AND HIS ATTORNEY" AND FROM MEMORANDUM OPINION.

Now, on the 27th day of March, 1922, come the defendants, Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, by their solicitors, R. T. Harding and Henry E. Monroe, and say that there is manifest error on the face of the record in the above-entitled suit, and that the memorandum opinion filed herein on the 29th day of September, 1921, is erroneous, and that the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney" made and entered in said suit on the 29th day of September, 1921, is erroneous and unjust to these defendants, and defendants hereby assign the making, giving and entering of said memorandum opinion and of said order herein as error, for the following reasons, and now make, file and present the following assignments of error upon which they and each of them will rely, as follows, to wit:

Exception I.

That the court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the receiver herein shall be charged to the plaintiffs, who procured his appointment, does not arise, and was not properly presented to the court, upon the hearing for the settlement of receiver's final report and account.

Exception II.

That the court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the receiver herein shall be charged to the plaintiffs, who procured his appointment, "will more properly arise on a motion to tax the costs upon the entry of the final decree".

Exception III.

That the court erred in finding and decreeing in said memorandum opinion and in said order that under the circumstances of this case the court may direct the payment of the receiver's account out of the fund in his hands in the first instance.

Exception IV.

That the court erred in finding and decreeing in said memorandum opinion that it had authority to provide for the compensation of the receiver and his attorney out of the fund administered; and this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that court), that there was no necessity for the appointment of a receiver in this cause, and that the appointment of said receiver was improper and illegal.

Exception V.

That the court erred in finding and decreeing in said memorandum opinion that it had authority to

provide for the compensation of the receiver and his attorney out of the fund administered; and that this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that court), that this court had no power to appoint a receiver in this cause, and that the appointment of said receiver was improper and illegal.

Exception VI.

That the court erred in and by said memorandum opinion and/or order in overruling the defendants' exceptions and objections to the fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney.

Exception VII.

That the court erred in finding and decreeing that when the receiver took charge of the mine of the defendant, Presidio Mining Company that he found it in the neighborhood of \$100,000.00, a little more or a little less, in debt; instead of finding and decreeing that said Presidio Mining Company had at the time the receiver took charge of said mine, a total of net liquid assets in excess of \$100,000.00, over and above all debts and liabilities.

Exception VIII.

That the court erred in finding and decreeing in and by said memorandum opinion that the receiver

after administering said mine for a period of shortly over three years, turned it back with the expenses of operation fully paid and with something in excess of \$600,000.00 in the treasury of said Presidio Mining Company, without also finding that there was due and owing from the Presidio Mining Company to Wm. S. Noyes under the lease of November 19, 1913, the sum of approximately \$154,000.00, in accordance with the final judgment or decree of the United States Circuit Court of Appeals for the Ninth Circuit; and without also finding that at the time the receiver took charge of said mine there was turned over to said receiver, in liquid assets in money, liberty bonds and mining supplies of the net value of \$192,279.99.

Exception IX.

That the court erred in ordering in and by the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", that all acts and things done by said receiver, as well as the said fourth and final report and account herein, be approved and confirmed, and that all objections and exceptions of the defendants thereto be disallowed.

Exception X.

That the court erred in ordering, in and by the "order confirming fourth and final report and account of receiver and his attorney", that the balance then remaining in the hands of the receiver, to wit: the sum of \$4524.68, be divided between said receiver and his

counsel, Frank R. Wehe, and that said receiver be discharged, and his bondsmen exonerated.

Exception XI.

That the court erred in ordering in and by the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", that all other questions raised by the defendants on the hearing of the fourth and final report and account of the receiver be postponed, for determination, until the hearing on the final decree herein.

Exception XII.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the first report and account of said receiver filed herein on the 2nd day of November, 1918, and in a supplemental report thereto filed herein on the 28th day of December, 1918, to wit:

- \$4270.76 paid to Walter B. Maling, as receiver's fees.
- \$4270.76 paid to Frank R. Wehe on account of attorney's fees.
- \$ 70.00 court fees.
- \$4500.00 paid to F. C. Handy, receiver's assistant at Shafter, Texas, ten months at \$450 per month.
- \$ 988.33 paid to receiver's bookkeeper at varying rates.
- 50.00 paid for premium on receiver's bond.
- 579.25 paid for traveling expenses from San Francisco to the mines at Shafter, Texas, and return for W. B. Maling, F. R. Wehe and F. C. Handy.

Exception XIII.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the second report and account of said receiver filed herein on the 10th day of December 1919, to wit:

\$5000.00 paid to Walter B. Maling, as receiver's fees.

\$5000.00 paid to Frank R. Wehe as attorney's fees for said receiver.

\$5400.00 paid to F. C. Handy, receiver's assistant at Shafter, Texas.

\$1225.00 paid to receiver's bookkeeper.

50.00 paid on account of premium on receiver's bond.

546.56 traveling expenses of W. B. Maling, F. R. Wehe and F. C. Handy.

3679.40 paid to Haskins & Sells, certified accountants.

2500.00 as fees paid to the Master in Chancery herein.

Exception XIV.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the third report and account of said receiver filed herein on the 30th day of November, 1920, to wit:

\$5000.00 paid to Walter B. Maling, as receiver's fees.

\$5000.00 paid to Frenk R. Wehe, as attorney's fees for said receiver.

\$5400.00 paid to F. C. Handy as receiver's assistant at Shafter, Texas.

\$1500.00 paid to receiver's bookkeeper.

\$ 50.00 paid as premium on receiver's bond.

Exception XV.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the fourth and final report and account of receiver filed herein on the 27th day of May, 1921, to wit:

\$2100.00 paid to F. C. Handy, the receiver's assistant at Shafter, Texas.

\$ 500.00 paid to receiver's bookkeeper.

\$ 50.00 paid on account of premium on receiver's bond.

Exception XVI.

That the court erred in not ordering and adjudging that the receiver must return to the defendants all the property which came into his possession as such receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendants, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business.

Exception XVII.

That the court erred in not ordering and adjudging that the receiver must return to the defendants all the property which came into his possession as such

receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business, but that said receiver have judgment against the complainants for the full amount of costs and expenses of the receivership herein.

Exception XVIII.

That the court erred in ordering and adjudging that the costs and expenses of the receivership be paid out of the funds in the hands of the receiver in the first instance, and in not also ordering and adjudging that the Presidio Mining Company and/or the defendants have judgment against the complainants for the full amount of the costs and expenses of the receivership.

Exception XIX.

That the court erred in not sustaining and/or allowing the objections and exceptions of the defendants to the fourth and final report and account of receiver, and each and all of the objections and exceptions to each and all of the preceding reports and accounts of said receiver.

Wherefore, the defendants pray that said "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", be reversed and set aside and that the District Court be directed to sustain the objections

and exceptions of the defendants to said fourth and final report and account of the receiver, and to all preceding reports and accounts of the receiver, and that said receiver be directed to return to the defendants all property which came into his possession as such receiver without deductions for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business; and that said receiver have judgment against the complainant for the full amount of costs and expenses of the receivership herein; or that said District Court be directed to sustain the objections and exceptions of the defendants to said fourth and final report and account of the receiver and to all preceding reports and accounts of the receiver, and that said District Court be directed to ascertain and determine the full sum or amount of the costs and expenses of said receivership by deducting from the full amount of the expenditures and payments made by the receiver, including his own compensation and that of his attorney, the expenditures which the Presidio Mining Company would have been compelled to make in the usual and ordinary conduct of its mining business, and that said District Court be further ordered and directed to enter a judgment in favor of the defendant, the Presidio Mining Company and against the complainants for the difference, that is, for the costs and expenses of said receivership, and that said defendants or either or any of

them may have such further relief as may seem meet and equitable.

R. T. HARDING and
HENRY E. MONROE,
Solicitors for Defendants.

J. J. DUNNE,
Of Counsel.

(Endorsed): Filed Mar. 27, 1922,

W. B. Maling, Clerk,
By J. A. Schaertzer,
Deputy Clerk.

I.

GENERAL HISTORY OF THIS LITIGATION.

This appeal comes up from the Southern Division of the District Court for the Northern District of California, Second Division; and by stipulation between the parties no part of the transcript of record in a former appeal, being No. 3253 upon the files of this court, was made part of the transcript of record upon the present appeal, but all pleadings, papers and matters, printed in the transcript of record in the former appeal No. 3253 may be referred to and used upon the present appeal with the same force and effect as if printed in the transcript of record on the present appeal (Trans. of Record, Vol. 2, pp. 539, 540). From the disclosures made in the transcript of record upon the former appeal and upon the present appeal, it appears that this litigation was originated by the filing of a bill of complaint by the present appellees on July 26, 1915.

Thereafter, in due course, amended and supplemental pleadings were filed by the present appellees, and in due time the present appellants made answer. Upon the issue thus made up, a trial resulted; and thereafter, on December 3, 1917, the trial judge stated his views concerning the cause in an oral opinion which will be found at page 417 of the transcript of record in No. 3253.

Thereafter, on December 28, 1917, the present appellants filed their motion to reopen the cause, but this motion was denied by the learned district judge on January 21, 1918; and the denial of this motion was fol-

lowed, on February 16, 1918, by the decree which will be found at page 424 of the record in No. 3253. From this decree, the present appellants prosecuted an appeal to this court: that appeal was very fully presented; and the result of that appeal was that this court, on October 27, 1919, made and entered the decree which will be found beginning at page 416 of volume 2 of the transcript of record in this present appeal; and the opinion upon which that decree was based will be found in volume 261 of the Federal Reporter at page 933 thereof.

Thereafter, the present appellees applied to this court for a rehearing of that cause; the rehearing was granted; the cause was reargued and resubmitted upon briefs; and thereafter, on January 17, 1921, this court reaffirmed its former opinion and judgment (Trans. of Rec. No. 3896, p. 419); and the opinion delivered by this court upon this rehearing will be found reported in volume 270 of the Federal Reporter at page 388 thereof. The present appellees then filed their petition in the Supreme Court of the United States, praying a writ of certiorari to this court, but that petition was denied by the Supreme Court on April 25, 1921; and thereupon a mandate in this cause was issued out of this court, which mandate was and is in the words of the aforesaid decree theretofore entered in this court.

In the original bill of complaint filed by the appellees, they prayed the District Court that

“a temporary receiver be appointed to take charge of all of the affairs and business of said Presido Mining

Company and of all its funds and property, subject to the direction of this Honorable Court''. (30.)

On August 19, 1915, by direction of Hon. M. T. Dooling, United States District Judge, the motion of the present appellants to dismiss that original bill of complaint was ordered granted unless the complainants, appellees here, within twenty days should file an amended bill stating a case for the granting of equitable relief, and incidental to this direction, the application for the receiver prayed for in the original bill was denied. Thereafter, the present appellees filed their amended bill of complaint wherein, after alleging in paragraph XIX that

"by reason of the foregoing facts and circumstances it is necessary that a receiver be appointed to take possession of the books, records, documents, business and moneys belonging to said corporation in San Francisco, subject to the order of this Honorable Court" (76),

they repeated their application for the appointment of a receiver, praying

"that a receiver be appointed to take charge, control and possession of the San Francisco office of said Presido Mining Company, its books, records, vouchers, business and affairs, and impound and keep all moneys derived from its said mining enterprise, after payment of operating expenses, and subject to the order of this Honorable Court";

and further,

"that said receiver also be authorized to receive and hold all moneys derived from operations of section 5, subject to the order of this Honorable Court". (Trans. of Rec. No. 3253, page 79.)

When the answers came in, after meeting fully the averments in the bill generally, the present appellants

dealt with the aforesaid paragraph XIX of said amended bill and in that behalf stated as follows:

“Answering paragraph XIX of said bill of complaint, these defendants deny that by reason of the facts and circumstances set forth in said bill of complaint, or any facts or circumstances therein set forth, it is necessary that a receiver be appointed to take possession of the books, records, documents, business and moneys belonging to said corporation in San Francisco, subject to the order of this Honorable Court” (136-7);

and they prayed that the complainants take nothing by their said amended bill of complaint (154). The same position was taken in the individual answer of Mr. W. S. Noyes, (201-2, 218).

Thereafter, on December 28, 1915, the learned judge of the District Court directed that the appellees' application for the appointment of a receiver be denied without prejudice (220). Subsequently, the appellees filed a supplemental bill, in which they asserted

“that the controlling stock of said corporation is in the hands of William S. Noyes, his subordinates and bidable directors, and said control will remain in the hands of said parties to the continued detriment and injury of said complainants and the other minority stockholders unless a receiver is appointed for said corporation”;

and followed this assertion up by praying judgment according to the prayer of the amended bill of complaint (237). And here, in passing, it may be remarked that it is impossible to conceive upon what theory the existence of the control of the stock of a corporation “in the hands” of a particular person, and the fact that “said control will remain” there, can, in itself, work “the continued detriment and injury” of another, or furnish any cause or reason for the appointment of

a receiver of the corporation, nor can it be perceived how such receivership can change the fact of that stock ownership or its attendant rights. It is common learning that a receiver takes no title to the property involved; and as the Supreme Court has pointed out the circumstance that the controlling stock of a corporation is in the hands of a particular individual, and will remain there, not only does not authorize any presumption of fraud, but it does not even authorize any inference that the directors are under the control of the owner of the majority of the shares (*Porter v. Pittsburg Steel Company* 120 U. S. 649-670). This supplemental bill was answered by the defendant, W. S. Noyes, who denied that the controlling stock was in the hands of his subordinates, admitted that the control was in the board of directors, and denied that the fact of such control "will be to the continued or any detriment or injury of complainants or other minority stockholders unless a receiver is appointed for said corporation" (259); and he prays that the complainants take nothing by their said amended bill of complaint (260); and the answer of the other defendants below, appellants here, took the same position (280-281). Subsequently, the appellees amended the prayer to their amended bill of complaint, enlarging their claims as to the receiver, and in that connection prayed:

"That a receiver be appointed by this Honorable Court to take entire charge of the affairs, assets and property of the Presidio Mining Company wherever situate, for a period of six months, or such further time as the court direct, with full power and authority to appoint all assistants required. *That unless there is an adjustment between all parties to this suit*, the majority and minority stockholders of said corporation, within said period, that

said receiver so appointed by this Court be authorized to sell the entire property and assets of the Presidio Mining Company, wind up its affairs, including section 5, and that said William S. Noyes and the other defendants be prohibited from in any way participating in said sale directly or indirectly, or from having anything further to do with said section 8 or section 5, or with the affairs of what is now the Presidio Mining Company.” (290.)

When the trial was concluded, the learned trial judge declared, in his oral opinion of December 3, 1917, “that the circumstances are such as to authorize the appointment of a receiver for this property” (423); and thereafter, on February 20, 1918, the order of the trial judge was filed appointing a receiver.

When the cause came on for disposition in the Circuit Court of Appeals, the decree of that court reversed the order appointing a receiver which had been made by the learned trial judge.

From this hasty review of the pleadings, it is plain that the desire for the appointment of a receiver, and the claim of necessity for said appointment, originated with the complainants. In other words, since in the original bill the complainants were “W. S. Overton and Carl A. Martin, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this complaint”, and since in the amended bill, those complainants were “W. S. Overton and Carl A. Martin”, and since in the supplemental bill the complainants were “W. S. Overton and Carl A. Martin”, it is quite plain that the desire for a receiver and the claim of necessity for the appointment of a receiver, were the desire and the claim of W. S. Overton and Carl A. Martin, the complainants upon whose

pleadings the cause was tried. These complainants alleged the necessity of the appointment of the receiver; these complainants prayed for the appointment of the receiver; upon their application, the receiver was appointed, and appointed by an order sweeping in its terms; and by them, only, was this expensive receivership unnecessarily and improperly imposed upon this enterprise. What, then, was the attitude of the defendants below, appellants here, with reference to this subject matter? A review of the pleadings will disclose that, from first to last, these defendants consistently and persistently denied any necessity for the appointment of a receiver and unbrokenly resisted the efforts of the plaintiffs below to have that appointment made. Not only did the defendants below, in so far as their pleadings are concerned, resist the appointment of this receiver, but, after the learned judge of the trial court declared his purpose to appoint a receiver, and thus the appointment of some person as a receiver became inevitable so far as the trial court was concerned, the defendants below, appellants here, entered into a stipulation as to the personality of the individual who should be appointed receiver; and that stipulation itself is a further evidence of the uniformly antagonistic attitude of the present appellants. The stipulation recites that "against the objections and exceptions of the above named defendants", the trial court is about to make its order that a receiver be appointed; it further recites that

"it is the intention of said defendants in due and orderly course thereafter to perfect their appeal from said order appointing such receiver", and it safeguards

the position of the defendants by recording the fact that they do not desire "this stipulation or anything herein contained to be, or to be construed to be, any waiver, *qualification*, limitation or restriction whatever upon their said appeal from said order";

and then,

"the premises considered, understood and agreed to",

it was agreed that Mr. Maling be appointed receiver, but that

"neither this stipulation nor anything herein contained shall in any way affect or abridge the aforesaid appeal, but, on the contrary, said appeal and all rights of said defendants therein are hereby expressly reserved, conserved and continued in the same force and effect as if this stipulation had not been entered into." (436.)

And when the appeal mentioned was perfected and reached this court, this matter of the receivership was discussed, and again, the defendants complained of the appointment and persisted in their contention that the receivership demanded by the complainants was wholly improper, and imposed upon the company, its stockholders and its property a burden as onerous as it was unnecessary. And the result was that the defendants below, appellants here, successfully resisted the imposition of this receivership upon the enterprise, and this court reversed the order creating that improper burden, and discharged the receiver.

From this history, certain conclusions follow upon which, with great respect, we cannot too earnestly insist. The first of these considerations is that, upon the present appeal, the legal impropriety of this receivership is not an open question; that impropriety is *res judicata* and the law of the case upon this appeal;

and upon well understood principles, the present appeal must be heard and determined in the light of the postulate that this receivership was illegal, unnecessary and wholly unjustified by the disclosures made before the learned trial court. And in the next place, the foregoing history establishes the further proposition that the resistance—the successful resistance—of the present appellants to this receivership is likewise not open to inquiry upon this present appeal; and this present appeal must proceed upon the theory that the receivership in question was consistently and unremittingly objected to by the defendants below, appellants here, until finally success crowned their efforts in that behalf. And it is further to be observed that while the learned judge denied without prejudice the application, during the earlier stages of the litigation, made by the present appellees for the appointment of a receiver, yet, after all the evidence had been adduced, the learned trial judge granted the appellees' application. In other words, when the appellees' application was granted the learned trial judge had the whole case before him; he had before him the same case which was presented thereafter to this court; and the learned trial judge made his order appointing this receiver upon precisely the same material upon which this court reversed the order appointing the receiver.

The receiver took possession on the 23rd day of February, 1918; and the ouster of the officers, directors and employees of the company from the property continued until after the Supreme Court of the United States had denied the above mentioned writ of certiorari. When the Supreme Court denied the writ, the

receiver, on the 6th day of May, 1921, returned to the corporate authorities the property of the corporation, but not all; he retained the sum of \$57,730.06 referred to in Exceptions XII, XIII, XIV and XV, and about five months after the mandate of this court was spread upon the minutes of the District Court he absorbed the further sum of \$4524.68 then in his possession, being the sum referred to in Exception X (see page 508 of the present transcript of record); and filed his final account. Prior to this time, the receiver had filed various reports of his administration; and the record shows that in all of these instances the defendants below, appellants here, maintained consistently their antagonism to the receivership. When the fourth and final report and account of the receiver came in, the defendants below prepared, served and filed their objections and exceptions to that report and account, which objections and exceptions will be found in volume 2 of the transcript of record upon the present appeal, beginning at page 356 thereof, and ending at page 430. These objections and exceptions are very full and explicit, and reiterate, renew and continue their opposition to the receivership and to the expenditure of any of the company's funds in connection therewith. These objections and exceptions having come on for hearing, the learned trial judge delivered the memorandum opinion which will be found at page 501 of the transcript of record upon the present appeal, and followed this memorandum opinion by an order confirming the fourth and final report and account of the receiver, which order will be found at page 504 of the present transcript of record.

II.

Jurisdiction.

Jurisdiction requires the concurrence of power over subject matter, parties and case; in the absence of a proper case for this power to operate upon, the power cannot operate; and in the absence of the facts upon which jurisdiction rightfully rests—when the facts which warrant the exercise of jurisdiction do not exist,—jurisdiction does not exist.

But, independently of this, and treating the present cause upon the assumption that it exhibits an erroneous exercise of jurisdiction merely, and that the present is a proper case for the application of "equitable discretion", still, no principle of equity justifies the taking of corporate assets or funds to defray the expense of a wrongful receivership persistently protested until finally discharged; no principle of equity requires a party to pay for the privilege of having a wrong done him, or authorizes the taking of one's property to defray an expense initiated and continued by the wrongful act of his adversary; every principle of equity justifies the view that he who creates or continues a wrong should remedy that wrong, and that he by whose act corporate assets are improperly depleted should be compelled to make reparation; and all of this is especially true where the superior equities have been adjudged to be with the wronged party, because "there is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other".

It cannot be doubted, we submit, that a receivership is a remedy both drastic and expensive: it suspends corporate functions; it displaces the corporate manage-

ment; and it delivers over the enterprise into the keeping of a stranger. Such was the language, purpose and effect of the order involved in the present appeal; and under its universal operation, the normal corporate authorities were ousted from the authority conferred upon them by the great majority of the stockholders and the law, and compelled to surrender the internal affairs of their company to strangers. Very naturally, then, complaint was justified of the unnecessary expense of a receivership which, at the behest of the present appellees invaded the internal affairs of the company, superseded normal corporate management, and wrested the property and affairs of the corporation from the control of its officers (*Jessup v. I. C. Ry.*, 43 Fed. 483; *United Electric Company v. Louisiana Elec. Co.*, 68 Id. 673, 676, 677; *Pearce v. Sutherland*, 164 Fed. 609, 613; *Cowell v. McMillan*, 177 Fed. 25, 43). And here, it is not irrelevant to point out that when this receivership was ordered, the enterprise of the Presidio Mining Company was a going concern: the whole record establishes that; and since no one of the persons connected with the enterprise was shown to be insolvent, or to be financially incompetent to respond to a decree, or to be doing or contemplating any act injurious to the company or any of its stockholders, that necessity which must appear in order to justify this extraordinary remedy, was not exhibited,—as observed by the Circuit Court of Appeals for the Fifth Circuit:

“The appointment of a receiver is an extraordinary remedy, and cannot be properly resorted to unless a necessity for it is shown”.

Joseph Drygoods Co. v. Hecht, 120 Fed. 760, 765;

and see, also

Gutterson v. Lebanon Co., 151 Fed. 72;
Tolman v. Ubero Plantation Co., 142 Fed. 270;
Elliott v. Superior Court, 168 Cal. 727;
Fisher v. Superior Court, 110 Id. 129;
Miller v. Kitchen, 103 N. W. 297;
Brenton v. Peck, 87 S. W. (Tex.) 898.

In other words, the appointment of a receiver calls for great caution and circumspection, properly applied in a proper case: as Mr. Justice Bradley put it, when speaking of the power of a court of equity to appoint a receiver,

“it is undoubtedly a power to be exercised with great caution; and if possible with the consent or acquiescence of the parties interested in the fund” (*Wallace v. Loomis*, 97 U. S. 146, 162-3);

and this view of the learned justice is supported by so many well considered authorities that it would be the merest pedantry to cite them in this place. Such being the general attitude of the courts as to this matter of appointing receivers, it has led in natural sequence to the view that responsibility for the expense of a receivership must be assumed by the person at whose instigation the receiver was appointed, where that appointment was wrongful, and especially where the appointment was resisted by the adverse party and where that resistance was ultimately successful. If the expense of a receivership were to be charged upon the estate or fund without reference to the propriety of the appointment, innocent persons would suffer great loss; and no principle of ethics or equity can justify the proposition that the defendant in the receivership,

who resisted, and finally resisted successfully, the imposition of that receivership should pay the expense of the person who thus dispossessed such defendant, who ousted him from his enterprise, deprived him of his authority, and carried on his business against his will and without his consent,—no principle of equity or ethics should compel a litigant thus to pay the expense of having his own property illegally taken out of his custody and delivered over to a stranger. The authorities sustaining this view of the law will be found collected in any standard treatise dealing with the subject matter of receivers (23 R. C. L., p. 106-7, *Thompson, Corporations*, First Supplement, sec. 6458; 8 *Fletcher, Corporations*, 8933, 8991; 34 Cyc. 350 et seq.; 4 *Pom. Eq.*, last ed., sec. 1662; 23 Ency. of Law, 2nd ed., 1106; 2 *Beach Mod. Eq. Pr.*, sec. 752; *Alderson, Receivers*, secs. 95, 627 (pp. 858-860), 633; 1 *Clarke, Receivers*, sec. 837; *Gluck & Becker, Receivers of Corporations*, secs. 65 (p. 302), 80, 100; *High, Receivers*, secs. 796, 809-2; 2 *Tardy's Smith on Receivers*, sec. 627; 1 *Whitehouse, Eq. Pr.*, sec. 496, pp. 825-6; 17 Ency. Pl. & Pr., p. 840); the overwhelming weight of authority, federal and state, sustains this view; and any authority which may be cited as apparently differing from the suggestion here made will, we believe, be found on examination to be distinguishable because of the presence of consent, acquiescence, or some local statute formulating a local policy upon this topic. In California, no statute can be found which attempts to regulate this specific subject matter, but the Califor-

nian view will be found reflected in the following authorities:

Grant v. L. S. Ry., 116 Cal. 71, 75;

Ephraim v. Pacific Bank, 129 Id. 589, 592;

Ephraim v. Pacific Bank, 136 Id. 646, 651;

Elliott v. Superior Court, 168 Id. 727.

It would seem to be plain, not only upon a consideration of well understood principles affecting jurisdiction, but also upon the views expressed in the numerous authorities dealing with receiverships, that where a court has no power or authority whatever to appoint a receiver, but nevertheless makes an order appointing a receiver, the latter has not by virtue of such order any power whatever to exercise any of the functions of a receiver: because the order is absolutely void and of no effect whatever, is binding upon nobody, and may be questioned in any collateral action or proceeding; and if any fund should come into the hands of such an appointee, it would so come by his voluntary and unauthorized act, and he would be liable therefor to any party entitled to it, as for money had and received (*Colwell v. Garfield Natl. Bank*, 23 N. E. (N. Y.) 739; *Johnson v. Powers*, 32 N. W. (Neb.) 62). What, then, do we mean when we speak of lack of jurisdiction to appoint a receiver? In the memorandum opinion of the learned judge of the court below, which will be found in volume 2 of the transcript of record upon the present appeal, beginning at page 501, it is observed by the learned judge that:

“Whether the objection that the Court had no jurisdiction in the cause, dwelt upon at such length is made seriously, it is difficult to know, but, if it is, it is without

merit as could readily have been ascertained by reference to the decree of the Circuit Court of Appeals wherein the decree of this Court was affirmed in its major features. That, of course, could not have been done in the absence of jurisdiction in this Court since the Appellate Court could have no jurisdiction to enter a decree upon the merits if jurisdiction was lacking here. The order appointing the receiver was reversed merely on the ground that the facts of the case in the opinion of the Circuit Court of Appeals did not warrant it, not that there was a want of jurisdiction to make it. In other words, the order appointing the receiver was reversed merely on the ground that jurisdiction was erroneously exercised. It is axiomatic that if a court has jurisdiction in a case it has the same power to decide erroneously as to decide correctly without exceeding its jurisdiction (*U. S. v. Arredondo*, 6 Pet. (U. S.) 691). Counsel have evidently confused the commission of mere error with the excess of jurisdiction. The two things are as far apart as the poles."

But the general definition of jurisdiction is the power to hear and determine concerning the subject matter in a case, and, as applied to a particular controversy, it is the power to hear and determine that controversy (*C. P. Ry. v. Placer County*, 43 Cal. 365); and any action taken in the absence of the facts upon which jurisdiction rightfully rests is void (*Scott v. McNeil*, 154 U. S. 34, 46-7). Not only, therefore, must there be jurisdiction both of the person and subject matter, but any order or judgment, to possess any validity, must accord with the established procedure governing the class in which the case in hand belongs (*Ex parte Lange*, 85 U. S. (18 Wall.) 163, 177-8; *Windsor v. McVeigh*, 93 U. S. 274; *U. S. v. Walker*, 109 U. S. 258; *Hatch v. Ferguson*, 68 Fed. 45; *Anthony v. Casey*, 5 Am. St. Rep. 277; *Seamster v. Blackstock*,

Id. 262; *Ex parte Giambonini*, 117 Cal. 573-576; *Crew v. Pratt*, 119 Id. 139, 148-9; *Johnson v. McKinnon*, 127 Am. St. Rep. 135; *Charles v. White*, Id. 674, 682-4). Every power exercised by any court must be found in and derived from the law of the land, and be exercised in the mode and manner prescribed by that law. If the court cannot try a question except under particular conditions, or when approached in a particular way, the law withholds jurisdiction, unless such conditions exist or the court is approached in the manner provided; and consent will not avail to change the provisions of the law in this regard. The validity of every order or judgment, then, depends upon the acquisition of jurisdiction; but in order that jurisdiction should exist in any tribunal, in any matter, there must be not only the abstract power to hear and determine, but also the concrete power to hear and determine the particular case, and render the particular judgment in the particular case, within the issues of that particular case, and in accordance with the established procedure governing that particular case.

Reynolds v. Stockton, 140 U. S. 254:

Within the issues;

Ex parte Reed, 100 U. S. 13:

The particular judgment;

Ex parte Giambonini, 117 Cal. 573, 576:

General rule as above; established procedure;

C. P. R. R. v. Placer County, 43 Cal. 365:

The particular judgment;

Russell v. Shurtleff, 28 Colo. 414:

The particular judgment;

Hope v. Blair, 105 Mo. 85:

Within the particular issues;

Ex parte Cox, 32 Pac. 197:

The particular judgment;

People v. Liscomb, 60 N. Y. 559:

The particular judgment;

Miskimmins v. Shaver, 58 Pac. (Wyo.) 411:

The particular judgment;

Neilsen, Petitioner, 131 U. S. 176, 183:

The particular judgment;

Ex parte Degener, 17 S. W. (Tex.) 1111:

The particular judgment;

Ex parte Lange, 85 U. S. (18 Wall.):

The particular judgment;

People v. Granice, 50 Cal. 447:

Defendant's consent unavailing;

People v. Hodges, 27 Cal. 340:

Established procedure; wrong county fatal;

Windsor v. McVeigh, 93 U. S. 274:

Established procedure;

U. S. v. Walker, 109 Id. 258:

Established procedure;

Anthony v. Casey, 5 A. S. R. 277;

Established procedure;

Seamster v. Blackstock, Id. 262:

Established procedure;

Johnson v. McKinnon, 127 A. S. R. 135:

Established procedure;

Charles v. White, Id. 674, 682-4:

Established procedure;

St. Louis Ry. v. Wear, 36 S. W. (Mo.) 357, 363—

A receivership case.

In the case last cited, it was said:

“It is urged by defendants that prohibition is not applicable to the situation existing on the circuit in the receivership case, and that no review can occur at this time as to the propriety of the disputed orders. But, if those orders were beyond the legitimate authority of the judge, the enforcement of them may be prohibited. *Morris v. Lenox* (1843) 8 Mo. 252. The fact that the suit in the circuit court invokes the equity powers thereof does not preclude the use of a prohibitory writ to keep the judicial action within the limits marked by law. A court of equity, no less than a court of law, may be called back within the boundaries of its rightful jurisdiction by the process of prohibition. Where a court or judge assumes to exercise a judicial power not granted by law, it matters not, so far as concerns the right to a prohibition, whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, *or is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question.* *State v. Walls* (1892), 113 Mo. 42; 20 S. W. 883; *in re Holmes* (1895), 1 Q. B. 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power. But where those remedies are inadequate to the exigency of the situation, in a particular case, a supervising court may properly interfere by the remedy now asked. If the orders in the Kerfoot suit were in excess of the jurisdiction of the learned judge who entered them, and if they have resulted in the seizure of a large part of a railroad line, and its detention from those entitled to—and whose duty requires them to—operate it for the convenience of the public, the case is one which would permit, if not demand, the application of a writ of prohibition to correct the wrong complained of. The remedy of prohibition affords opportunity for a direct attack upon proceedings questioned upon the point of jurisdiction. *If the facts shown by a record reveal an unwarranted application of judicial power, causing an*

immediate and wrongful invasion of rights of property, the writ of prohibition may go to check the execution of any unfinished part of the extrajurisdictional programme that may have been outlined. Sometimes the writ may be so shaped as to undo the steps that have been taken in such a programme. To justify the use of the writ, it is not essential that the proceedings in dispute should be so entirely void as to warrant a declaration of nullity upon a collateral inquiry. The statute governing proceedings in prohibition makes no change in the ancient law on these points. Laws 1895, p. 59."

The application of this principle to the present predicament would seem to be obvious. If, as stated by the learned trial judge,

"the order appointing the receiver was reversed merely on the ground that the facts of the case in the opinion of the Circuit Court of Appeals did not warrant it",

then, plainly, no power or authority existed in the lower court to justify the order appointing the receiver. If it be, as we claim it is, an essential ingredient in the conception of jurisdiction that the action of the lower court should accord with the established procedure governing the class in which the case in hand belongs,—if the proper concept of jurisdiction includes not only the abstract power to hear and determine, but also the concrete power to render the particular judgment in the particular case, and if it be also true that, to employ the language of the learned trial judge, "the facts of the case did not warrant" the order appointing the receiver, upon what basis can it be correctly claimed that the making of that order was merely an erroneous exercise of jurisdiction? It is not disputed that the lower court had authority in a proper case to appoint a receiver, but a receiver could not be ap-

pointed unless the proper case existed to justify the appointment; and since the appellate court determined that this proper case did not exist, obviously the authority to appoint at all, in the pending cause, did not itself exist. In past times it seems to have been a convenient refuge for embarrassed judges to say, in certain cases, that certain acts, orders or proceedings, however flagrant in character they may have been in special cases, were simply an erroneous exercise of jurisdiction; but the development of thought in modern law has broken away from this antiquated theory; and as the foregoing authorities establish an order of court is not to be rescued from condemnation upon the theory that the court had general jurisdiction of the person and subject matter, if the particular order in question is itself without justification by a proper case to support it. Would it be said, indeed, that in an ordinary action upon an ordinary promissory note before a superior court of general jurisdiction, and of jurisdiction over the person and subject matter in that pending proceeding, an order made in such a case decreeing specific performance or directing the imprisonment for life of the defendant could be justified by the claim that the court had jurisdiction of the person and subject matter, or protected from condemnation upon the theory that it was merely the erroneous exercise of an admitted jurisdiction? While it is true that a Superior Court has jurisdiction to hear and determine an ordinary action at law brought by a private individual against a corporation for goods sold and delivered, and thus has jurisdiction of the subject matter of the action, and of the persons of the parties, would

this, under the authorities heretofore cited, justify the claim that in such an action the court would be authorized to appoint a receiver of the entire assets of the defendant corporation (*Elliott v. Superior Court*, 168 Cal. 727)?

But the learned judge of the court below speaks of the erroneous exercise of jurisdiction; and yet, if we assume the present record to exhibit an erroneous exercise of jurisdiction merely, the same result would still necessarily follow in so far as the responsibility of the applicant for the receivership, for the expense of that receivership, is concerned. Because, even if we assume that jurisdiction existed to make the appointment at all, and that therefore in the first instance the expenses of the receivership are to be met out of the assets or fund in hand, IF ANY, still that assumption does not dispose of the ultimate liability for those expenditures. If those expenditures depleted the assets or funds in a case in which it has been finally adjudged that the receivership was unwarranted, who should restore that depletion, as between the complainants below who wilfully caused the receivership and the consequent depletion, and the company whose possession was wrongfully invaded, whose property was wrongfully taken and depleted by those expenditures, whose officers were ousted without warrant, and who steadily protested until finally successful in that protest? The applicable principle, at once ethical and equitable, is thus exhibited by the Supreme Court of Montana:

“Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, though the order of appointment be vacated or reversed: Beach on

Receivers, sec. 769. But to whom should this compensation and expense be assessed? 'The compensation of a receiver is taxable costs; *Hutchinson v. Hampton*, 1 Mont. 39; *Ervin v. Collier*, 2 Mont. 605. The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in *Hutchinson v. Hampton*, 1 Mont. 39, is nevertheless (in absence of exceptional facts) *ultimately taxable to the losing party, whose wrong occasioned the appointment*, as was declared in *Ervin v. Collier*, 2 Mont. 605'; *State ex rel. Cornue v. Lindsay*, 24 Mont. 352; 61 Pac. 883. 'The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action (citing cases). But this does not preclude the court, upon a discharge of the receiver *before the conclusion of the action*, as was the case here, from fixing his compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed'; *State ex rel. Heinz v. District Court*, 28 Mont. 22, 7; 72 Pac. 613.

In *McAnrow v. Martin*, 183 Ill. 467; 56 N. E. 168, the court said: 'When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment; *Weston v. Watts*, 45 Hun. 219; *French v. Gifford*, 31 Iowa, 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige 438; *Radford v. Folsom*, 55 Iowa 276; 7 N. W. 604'. The same doctrine is announced in *Beach on Receivers*, par. 119; *Richmond v. Irons*, 121 U. S. 27; 7 Sup. Ct. Rep. 788; 30 L. ed. 864; *People v. Jones*, 33 Mich. 303; *Welch v. Renshaw*, 14 Colo. App. 526; 59 Pac. 967. As was said in *Ogden City v. Bear Lake etc. Irr. Co.*, 18 Utah 279; 55 Pac. 385: 'The expense incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for it to incur should be charged to the party procuring the order. Such expenses should be regarded as incurred in consequence of

an error at his instance; *Weston v. Watts*, 45 Hun. 219; *City of St. Louis v. Gaslight Co.*, 11 Mo. App. 237; *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321; 35 N. E. 630; *Moyers v. Coiner*, 22 Fla. 422; *French v. Gifford*, 31 Iowa 428'. See, also, *Cassidy v. Harrelson*, 1 Colo. App. 458; 29 Pac. 525.'

Hickey v. Parrott Silver Co., 108 A. S. R. 510, 516-7.

In other words, taking the learned trial judge at his word, and treating this receivership and its expense as the result of an erroneous exercise of jurisdiction merely, and assuming, moreover, that in the first instance these expenditures should come out of the company assets or funds, the question nevertheless recurs, upon whom should rest the real liability for the wrong done? Or, to put the question in a different form, in the matter of these expenditures, as between the complainants, upon the one side, and the company, upon the other, whose equities are superior?

The assumption here indulged that the appointment of the receiver was not absolutely void, but is to be treated as having been improperly made in the course of an erroneous exercise of jurisdiction, leaves quite untouched the injustice and inequity, in such a case of requiring the receiver's expenditures to be paid out of the assets or funds of the injured corporation, without affording to the latter any redress against those primarily responsible for the damage caused; and if under such circumstances, a court will be governed largely by the individual merits of each case and exercise an equitable discretion, compelling either the company or the complainants to make good those expendi-

tures as justice may require, we are thus led to the inquiry as to the respective equities of the contending parties,—for it is by the consideration of those equities that the discretion in question will be governed.

If the ultimate liability for the expenses incident to this receivership is to be determined as a matter of equitable discretion, then, if by the phrase “discretion of the court” the will of the judge rather than that of the law be intended, then the following condemnation of personal discretion by Lord Camden, one of the greatest of the constitutional lawyers of the English bar, will not be irrelevant:

“The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.”

(See this language formally adopted in *State v. Cummings*, 36 Mo. 279; and see also *Maybry v. Ross*, 48 Tenn 769.)

Judicial discretion is obviously distinguishable from sentiment (*U. S. v. Conrad*, 156 Fed. 248); it does not regard whim or caprice; it means a sound legal discretion only, which must be exercised in conformity with the rules and the analogies of the law (9 Am. & Eng. Ency. Law, 2d ed., 473-474); and

“Where the discretion of a court is spoken of, a sound legal discretion is meant, not an arbitrary *sic volo*.”
(*People v. Supt. Ct.*, 5 Wend. 126.)

Long ago in the history of the law recognition was accorded the thought that

“judicial discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular” (*Rex v. Wilkes*, 4 Burr. 2539;

but with the flight of time no departure from this conception is observable. Relatively recently, in New York, when speaking of judicial discretion, the following characterization was made:

“It is always a legal discretion to be exercised in discerning the course prescribed by law. When that is discerned, it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law” (*Tripp v. Cook*, 26 Wend. 152);

and in another case, the court pointed out that

“it does not mean a wild self-willfulness, which may prompt to any and every act, but this judicial discretion is guided by the law—see what the law declares upon a given statement of facts, and then decide in accordance with law—so as to do substantial equity and justice. Judicial discretion is to see what would be just according to the law in the premises” (*Faber v. Bruner*, 13 Mo. 543).

And as put by the great Chief Justice,

“Judicial power, as distinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law” (per Marshall, C. J., in *Osborn v. Bank of U. S.*, 22 U. S. (9 Wheat.) 738, 866).

There has, indeed, never been any doubt in this State as to the meaning of judicial discretion, and it has here

been uniformly held that the discretion which finds play in emergencies similar to that presented here is not an arbitrary caprice governed by no rules and disposing of the rights of litigants according to whim.

Bailey v. Taaffe, 29 Cal. 424, leading case;

Stringer v. Davis, 30 Id. 322;

Ex parte Hoge, 48 Id. 5;

Ex parte Marks, 49 Id. 681;

Lybecker v. Murray, 58 Id. 189;

Cargnani v. Cargnani, 16 Cal. App. 96.

It thus results that judicial discretion is not a name for a vague, loose or indefinite power acting independently of established rules and analogies: on the contrary, and especially at this advanced day, the term connotes the accurate ascertainment and proper application of fixed principles; and, as applied to a predicament similar to that at bar it calls for the same analysis of fact and application of legal rules as in any other situation presented to a court of justice for consideration and decision. In the exercise of judicial discretion, a court is quite as much bound by accepted doctrines, both of substantive and adjective law, as in the exercise of any other judicial function. And in this connection, as illustrative of the relevant point of view, the following observations are not inappropriate:

“Appellants contend that their equities are superior to those of appellee, and that the court erred in placing the costs of the Wilson foreclosure on them. Appellee contends that the cost of the Wilson foreclosure was placed upon appellants by the court in the exercise of a sound discretion, which is conclusive of the case.

Learned counsel for appellee have cited numerous authorities in support of the position that costs are not

necessarily adjudged against the losing party in chancery cases, but that the chancellor may, in the exercise of a sound discretion, apportion the costs according to equitable principles when the facts justify. The rule contended for is sound, but is only applied when equities between the various parties warrant it. For example, if one party is at fault more than another, it is proper to distribute the costs according to the fault of each; or, if equally at fault, to divide the costs, or to adjudge the entire costs against the party wholly at fault. *But the rule is not applicable in cases where one party has superior equities to the other. The costs in that character of case should never be adjudged against a party holding superior equities.* For example, a prior lienor should recover the costs necessary to enforce his lien before a junior lienor would be entitled to his debt or costs. *There is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other."*

Fry v. White, 201 S. W. (Ark.) 1105.

And here considerations may be suggested which not only distinguish citations which may be made by the other side, but also should direct any discretion exercisable in the premises, toward charging the expense of the receivership against those who cause it. One of the first features which appeals to the mind in looking back over the history of this litigation is this, that the objectionable receivership was the direct product of an erroneous view of the whole cause, an erroneous view whereby the real equities of the parties were wholly mistaken. This may be illustrated by developing a statement made by the learned trial judge in his memorandum opinion, in this case.

In the opinion of the learned trial judge, the statement was made that "the decree of this court was affirmed in its major features"; but with every respect

for the learned trial judge, we are constrained to say that our reading of the opinions of this court convinces us that the decree of the learned trial judge was not affirmed in its major features, but was reversed. Some few illustrations will make this clear. The decree of the trial court, which will be found at page 424 of the transcript of record in number 3253, when read in connection with the oral opinion of December 3, 1917, fairly reflects the "major features" in question. One of these features was the acquisition of the Osborn stock by Mr. William S. Noyes; and that feature will be found dealt with in the oral opinion above mentioned, at page 418-9 of the transcript of record in number 3253, and in the reversed interlocutory decree which flowed from it. The position taken by the learned trial judge was that:

"The Osborne shortage, I am satisfied, came to the knowledge of the defendant, William S. Noyes, as early as December, 1912; that he took advantage of it to secure from Osborne that stock without any real compensation whatsoever; and that it was by the use of funds which belonged to the company, but in a manner that never resulted in the shortage being made good to the company. Of course, as a book transaction it appeared to be, but in reality it was not. I need not recite the various circumstances which culminated in the control of this corporation coming absolutely within the hands of William S. Noyes; it was by a series of transactions which to my mind led to but one result, and that is the conclusion that it was not a just and fair transaction."

This was one of the "major features" referred to by the learned trial judge; was it affirmed by the appellate court? In dealing with this feature of the cause, this

court, after going over the relevant facts, summed the situation up thus:

“In other words Noyes placed in the records of the corporation the usual evidence of his rightful, legal ownership of that stock. Noyes left San Francisco for the mine four days later and he testified that on January 19th or 20th he first learned of the Osborn shortage by a telegram from his brother B. S. Noyes in San Francisco.

The plaintiffs claim that Noyes knew of this shortage before he left for the mine and that he obtained the transfer of the stock from Osborn to himself under a threat to expose Osborn and bring him and his family to disgrace. *Aside from the absurdity of charging Noyes with extortion in securing the legal title to his own property, there is no evidence to support even the color of coercion in the transfer”.*

And again, still dealing with this subject matter, and after reviewing the testimony of the witness Kniffin, this court further observed:

“This uncontradicted fact alone appears to be sufficient to establish the truth of Noyes’ testimony. But in any point of view, the burden of proof rests on the plaintiffs to prove their charge clearly and distinctly and overcome the direct and positive testimony of B. S. Noyes and Laura M. Doherty confirming and corroborating the testimony of Wm. S. Noyes upon this question.

Plaintiffs also charge that Noyes extorted from Osborn the stock he held in his own right which he was requested to transfer and did transfer as security for the money loaned him to make good his shortage. *There is no evidence or inference to support this charge and we know of no law that makes such an act extortion.*

In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of Wm. S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders.”

Bearing steadily in mind the attitude of the learned trial judge as displayed by his deliverances upon this topic, and contrasting with those deliverances the findings of this appellate court, will any fair man say that, so far as this topic is concerned, "the decree of this (the trial) court was affirmed in its major features"?

Another feature of the cause upon which the attitude of the learned trial judge was unmistakable, was the acquisition of Section 5; and as to that, the learned trial judge expressed himself as follows:

"The main matter for consideration in the case—the acquisition in the name of William S. Noyes of Section 5—was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form it was nevertheless an acquisition of that property by funds of his company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character of Section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about."

But, in dealing with this feature of the cause, this court had the following to say:

"Were the moneys used to pay these Noyes notes taken from the treasury of the corporation? The evidence in the record is that it was not so taken."

The court then referred to the testimony of Mr. Noyes giving minute details as to the sources from which the moneys came, to the inquiries of the learned trial judge himself into that subject matter, and to the admission made by the solicitor for the complainants below, and then proceeded:

“This testimony stands uncontradicted and shows beyond question that Noyes gave his notes in the first instance to secure the money and credit to buy the stock of the Silver Hill Mill and Mining Company owning Section 5 and that he subsequently paid these notes not out of the funds of the corporation, but out of his own pocket, and this fact is finally and conclusively found by the court in the interlocutory decree which, while it determines that Wm. S. Noyes is a trustee for said Section 5 for the benefit of the Presidio Mining Company provides that such title is ‘subject however to the payment of its purchase price of \$24,009.33 and taxes or assessments paid by him on Section 5, or other moneys properly paid by him on account of Section 5, and that he be allowed interest on all of said sums from the date of payments made by him at the rate of seven per cent. per annum’.

If the money paid by Noyes for Section 5 is to be refunded to him as directed by the Interlocutory Decree, it follows as a matter of course that the money was paid by Noyes out of his own funds and not out of the funds of the corporation, nor out of any funds received from the corporation in any other than in a legitimate and proper business way.”

Again, we ask, was this feature of the cause, also, affirmed by the Court of Appeals? There is, we submit, but a single answer possible to this inquiry.

In dealing with Section 5, a conceded “major feature” of the case, the learned trial judge summarized his attitude in the following language:

“Under these circumstances, I am satisfied that equity, which looks to the substance and ignores the mere form

in which a transaction is cast will hold that property in equity to be the property of the Presidio Mining Company”:

Were these views of the learned trial judge relative to this feature of the controversy affirmed by the Appellate Court? The acquisition in the name of William S. Noyes, of Section 5, was declared by the learned trial judge to be “the main matter for consideration in the case”, and the learned judge added that the acquisition of Section 5 in the name of Mr. Noyes

“was nevertheless an acquisition of that property by funds of this company in fact”,

and that the entire transaction from start to finish was

“in fraud of the rights of its (the company’s) minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Mr. Noyes”.

Do the opinions of the Appellate Court sustain the views here expressed? In the original opinion on appeal, after discussing the case generally, and after declaring that

“in all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company, or any of its stockholders and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders”,

this court went on to say that:

“It is clear from this evidence that Noyes purchased Section 5 with his own money but for the benefit of the Presidio Mining Company; that he has always been ready to convey it to the company upon the payment to him of its purchase price and as late as February 28,

1916, in his last report to the stockholders, he declared in effect that he held the title for that purpose and no other."

And again, after having granted a rehearing, and after having reconsidered the whole case, this court said:

"Noyes admits that he purchased the title to Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to convey. He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent."

Another feature of the cause, and a "major feature" if we are to adopt the language of the learned trial judge, was the so-called "bonus resolution",—a resolution which the learned trial judge referred to in the following language:

"This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right in its inception; and, of course, the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Was this "major feature", also, affirmed by the Court of Appeals?

Dealing with that topic, this court, among other things, speaking of the bonus resolution, and after de-

scribing it in the original opinion as "a temporary arrangement to accomplish a temporary purpose", thus fixes its quality in the opinion on rehearing:

"The 'bonus resolution' is a misnomer. It did not provide for the payment of money as additional compensation or as compensation at all, but for ore delivered by Noyes from Section 5 to the Presidio Mining Company. This fact was set forth in the defendants answer and clearly established by the evidence."

And, again, in the original opinion, still dealing with the so-called bonus resolution, this court declared that

"the security of the Presidio Mining Company for the agreement was ample and rested in the fact that the payments were to be made out of the earnings of the Company and from no other source; that the ore already exposed and broken down was of a high grade; was in sight and available for delivery to enable the company to make the payments at the dates mentioned in the resolution".

And in further evidence of the proposition that no justification exists for the declaration by the learned trial judge that "the decree of this court was affirmed in its major features", we call attention, in this connection to the following unmistakable language of this appellate court:

*"In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant, sinister power or influence over the Board of Directors or any of the stockholders. * * * Upon the face of the record and in view of all the evidence, we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration."*

In the face of this convincing language, can any fair-minded man justly claim that this "major feature" of the case was affirmed by the Court of Appeals?

The quotations which we have already made from the opinions of this court establish that the view of this case taken by the learned trial judge, and the view of this case as taken by this Appellate Court, are, to adopt a phrase of the learned trial judge, "as far apart as the poles"; and if we were to extract from the opinions on appeal evidences of their complete divergence from the view formulated by the learned trial judge, we should be compelled in this place to print those opinions in their entirety. So far as the minor charges are concerned, which these appellees labored so industriously during the earlier stages of the cause, this court observed that

"there are a number of other minor charges against the defendants which we do not think of sufficient importance to review. We have, however, examined the evidence relating to them and we find them not proven";

and in the opinion upon rehearing, this court further observed that

"we find nothing which justifies any decree other than a decree for conveyance of Section 5 by Noyes to the company upon payment of the purchase price *in accordance with his offer*. That Noyes in all his dealings with the Presidio Mining Company acted in good faith is abundantly established by the evidence";

and added, after a careful re-examination of the evidence and a review of the argument on this rehearing,

"we find no reason for changing our original opinion in any material matter. In our former opinion we found the charges of conspiracy and fraud directed against

William S. Noyes and his co-defendants unsupported by the evidence”.

The amount of the salaries of the corporate officers was another “major feature” of the case which attracted considerable attention in the court below; and upon this subject matter, the learned trial judge expressed himself as follows:

“I am satisfied under the evidence that the large increases of the salaries of these officers, under the circumstances which the evidence discloses, were not honest; that the situation did not call for such increases, and, having been made under circumstances where they must be explained, they must be accounted for, and unless they can be explained, the officers will have to account for the excess that has been added to their salaries by the various raises that have been shown.”

Was the view here formulated affirmed by the Court of Appeals? That subject matter was quite fully considered by this court, and, without quoting at length, the following may be excerpted from the original opinion:

“The burden of proof was upon the plaintiffs to prove the illegal and fraudulent character of the salaries paid to the directors and officers in San Francisco. The presumption is that salaries paid for so many years to these officers prior to November, 1914, without protest or objection on the part of the minority or other stockholders were reasonable and just and the reduction of these salaries in November, 1914, eight months before the commencement of this suit, was clearly evidence of a just regard for the interest of the company and its stockholders and is directly in contradiction of plaintiff’s claim and the finding of the interlocutory decree that the salaries were all illegal and fraudulent.”

“The defendants had already produced evidence that the salaries were reasonable and just, partly by direct

testimony and partly by evidence of a continuance of salaries for a number of years without protest or objection on the part of the minority or other stockholders and by evidence of a reduction of salaries prior to the commencement of this action to meet the depreciation in the price of silver. This evidence was not contradicted and certainly no inference of fraud or injustice can be drawn from this state of the evidence which tends to show that the salaries were at all times just and reasonable."

It is submitted that no candid person can arise from the reading of the oral opinion of the learned judge of the court below without realizing that the governing thought in his mind was

"a uniform and persistent course of fraudulent manipulation of the affairs of this corporation" (Trans. of Record No. 3253, p. 420);

and that a prominent feature of this course of fraud—a "major feature" to adopt the learned judge's language,—was the lease of November 19, 1913. But that, in this "major feature" also, the views of the learned trial judge were rejected by this court, the following excerpts from the original opinion of this court do, we conceive, abundantly establish:

"It follows that the recitals in the lease of November 19, 1913, concerning the terms of the lease of January 25, 1913 'that the profit made by the Presidio Mining Company out of the ores taken from Section 5 up to that date had been unduly large and unfair to Noyes' were absolutely correct if limited to the terms of that lease and justified Noyes in terminating that lease and the Presidio Mining Company in entering into a new lease that would state the actual facts and correctly represent the rights of the parties thereto."

And this court, in that same original opinion, further observed that:

“Upon the face of the record and in view of all the evidence we are of the opinion that the lease of January 25, 1913, the resolution of February 15th, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration.”

Not only this, but in summarizing the situation in the opinion upon rehearing, this court took occasion to observe:

“After a careful re-examination of the evidence and a review of the argument on this rehearing, we find no reason for changing our original opinion in any material matter. In our former opinion we found the charges of conspiracy and fraud directed against Wm. S. Noyes and his co-defendants unsupported by the evidence. This conclusion left the case as Judge Dooling found it upon the insufficiency of the original complaint with respect to the controlling question in the case, namely.

1. The evidence did not show that Section 5 was bought with the money of the Presidio Mining Company;

2. The evidence did not show, that the lease of November 19, 1913, was not profitable to the Presidio Mining Company;

3. The evidence did not show that Wm. S. Noyes was not the owner of Section 5;

4. The evidence did not show any legal or equitable interest of the Presidio Mining Company in Section 5;

5. The evidence did not show that the salaries paid the officers of the company were illegal or fraudulent, but on the contrary the evidence did show that such salaries were reasonable and just.”

This somewhat incomplete comparison and contrast between the views of the learned trial judge, upon which his interlocutory decree was predicated, and the views of this court upon appeal make it very clear,

we believe that the statement of the learned trial judge that "the decree of this court was affirmed in its major features" is not sustained; in point of fact, the only portion of the interlocutory decree which was affirmed was that portion which dealt with Section 5,—a section which William S. Noyes was ready, able and willing at all times, and without any judicial decree whatever to compel him to do so, to transfer to the Presidio Mining Company upon payment of its purchase price and incidental moneys: but in all other respects, including the injunction and the receivership, the decree appealed from was entirely reversed. In other words, the attitude of the learned trial judge in making the order to reverse which the present appeal is prosecuted rested upon an essentially erroneous basis.

The foregoing observations, we submit, establish this receivership to have been the product of an erroneous conception of the real equities in the case; but that is not the only feature of the cause which should guide equitable discretion in the direction of requiring these expenditures to be met by those who were responsible for the receivership which occasioned them; and, in addition to the foregoing considerations, it should be pointed out that no real necessity existed for any receivership whatever, for the obvious reason that the injunctions which were issued in the cause afforded ample protection to the complainants. Those injunctions were issued upon the application of the complainants below, were directed to matters which they considered should be made the subjects of injunctive re-

lief, and covered moneys and lands and stock. To adopt the language of Circuit Judge Pardee (*New Elect. Co. v. Louisiana Elect. Co.*, 68 Fed. 673, 676, 677), limitations were imposed by these injunctions which prevented the defendants from alienating or encumbering the property or from paying out or disposing of the revenues; should not these injunctions therefore have sufficed for the protection of these complainants without the additional and expensive invasion of a receivership? Minority stockholders are not entitled to a receiver except in a most extreme case; but where defendants are restrained by injunctions which impound moneys, land and stock, where no one connected with the enterprise is shown to be unable to respond to a decree, where no claim is made that any person connected with the enterprise is doing or contemplating any act or thing injurious to the company or any of its stockholders, where the fraud asserted but unproved, is claimed to have occurred five years before the receiver was requested, and where all properly established complaints could have been met and provided for in a final decree,—where all these features, and others, concur in a cause, how can it be said that such cause is the extreme case in which the minority stockholder may displace the regular corporate authorities, suspend the corporate functions, and hand over the corporate assets and affairs into the keeping of strangers? Like a receivership, an injunction is a most drastic remedy; it is an extraordinary remedy which is reserved for extraordinary cases; no more effective *lis pendens* could well be imagined (*Barstow v. Beckett*,

110 Fed. 826, 827-8); what necessity, then, existed for this onerous receivership?

Not only was the receivership a product of an erroneous view of the cause, and not only was there no necessity for this receivership, but, in assembling the superior equities of the defendants below, appellants here, it should not be overlooked that no benefit accrued from this receivership *qua* receivership,—no benefit which had its primary origin in the receivership,—no benefit distinct from the normal benefit of ordinary operation,—no benefit other than that which flowed as a sequel from the antecedent efforts of the company itself. In this connection, it is not irrelevant to point out that during five years of the defendants' administration of the property as directors of the corporation, the assets had largely increased in value; and when the complainants sought to attribute this development to their own vigilance in guarding the company's welfare, this court pointed out that "this statement is unsupported by any evidence in the record", and that "during this time at least four-fifths of the assets of the company were accumulated" (see opinion on rehearing, 270 Fed. 388, 402).

In addition to the foregoing considerations, it must be pointed out that no consent, direct or indirect, proximate or remote, was ever given by the defendants below, appellants here, to this receivership; on the contrary, their entire course of conduct in that matter from beginning to end was one of persistent, unremitting opposition and antagonism.

Moreover, this receivership was not sought in good faith; the very fact that these complainants were adequately protected by the injunctions which had been issued, emphasizes their lack of good faith in imposing upon this company this burdensome and expensive receivership; and we do not hesitate to say that this receivership was pursued in bad faith and in the development of a rule or ruin policy; and in this connection we cannot refrain from directing the attention of the court to its opinion on rehearing wherein is quoted the letter from the complainant Overton to Mr. Gleim in Texas, on July 29, 1915, three days after the filing of the original bill of complaint, and the comments of this court upon that letter immediately following its quotation. We do not hesitate to say that the whole attitude of the only active complainant in the cause, Overton, was grossly selfish and inequitable and lacking in good faith; and the rule seems to be quite clear that the costs and charges of a receivership will be especially assessed against the applicant for the receiver if it appear that in any degree he has acted in bad faith (compare *Miller v. American Light Co.*, 181 Ill. App. 6, 23; *Bellamy v. Wichita Valley Tel. Co.*, 105 Pac. (Okla.) 340; *Wagner v. Phila. etc. Co.*, 81 Atl. (Pa.) 944; *Brock v. Rudug*, 119 N. E. (Ind.) 491; *Ogden City v. Bear Lake Irrigation Co.*, 55 Pac. (Utah) 385; *Fry v. White*, 201 S. W. (Ark.) 1105; *Sullivan Timber Co. v. Black*, 48 So. (Ala.) 870). But if further evidence of the bad faith of the only complainant who exhibited any real activity in the cause were needed, it can be found in the amazing demand in his amended prayer to

his amended bill (Trans. of Record, No. 3253, p. 290), a demand which contemplated complete extinction and annihilation of the Presidio Mining Company; and also in the condition formulated in that enlarged prayer whereby the very existence of the company is sought to be made dependent upon "an adjustment between all parties to this suit". And just here it is pertinent to inquire, looking back over the entire course of conduct of this complainant from the beginning, what he meant by an "adjustment"; and in view of all we know concerning the preposterous but unproved claims made by the individual who yearned to "control the management" of this enterprise, can there be any doubt in the mind of any rational person but that he meant nothing less than the surrender by the defendants below of their legal rights, and the abandonment by them of defenses which this court has held to be invincible?

And again, no real controversy existed as to the transfer of Section 5; it abundantly appears throughout the record and in the opinions of this court what was the attitude of Mr. Wm. S. Noyes with reference to that transfer; but, as to all matters in real controversy, including this receivership, the decree below was reversed by this court.

For reasons already advanced we respectfully insist that the learned judge of the lower court was without jurisdiction to appoint this receiver, although having jurisdiction of the subject matter and of the parties; he was without the concrete power to render that particular judgment in the particular case then pending before him, within the issues of that particular case

and/or in accordance with the established procedure governing that particular case,—in a word, while he was authorized to appoint a receiver in a proper case, yet without a proper case he had no such authority. But we have gone beyond this, and we have treated the situation from a point of view as favorable as any to which the present appellees could justly appeal; we have treated this as a case, not of the absence of jurisdiction, but of an erroneous exercise of jurisdiction merely; so treating the case, we have pointed out that courts are vested with an equitable discretion—a sound discretion responsive to existing equities, and not a capricious whim; and we have pointed out that in the exercise of this equitable discretion courts may, according to the justice and equity of each case, assess the expense of the receivership against the fund, or against the applicant, or apportion that expense among the parties, according as the respective equities may appear. We have then urged as among the adjudged superior equities of the present appellants, the fact that this objectionable receivership was the direct and immediate product of an erroneous view of the whole cause, whereby the real equities of the parties were wholly mistaken; and also that no real necessity existed for any receivership; whatever, the existing injunctions furnishing ample protection to the complainants; and also the absence of any real benefit primarily originating in the receivership itself, and not a sequel from antecedent effort by the company itself; and also the absence of any consent whatever by the present appellants to this receivership and their constant and persistent opposition thereto;

and also, that the receivership was not sought in good faith, but to further a selfish and inequitable motive; and also that as to all matters in real controversy, including this receivership, the decree below was reversed by this court. What equities, then, have these appellees disclosed which can justly be said to be superior to those of the appellants? Did they make good that accusation of fraud upon which their whole case rested? In any of the particulars, described as "material features" by the learned judge below, did they sustain their contention either in this court or upon the application for certiorari? Have they traced to these appellants any single violation of any one of the injunctions which impounded lands, moneys and stock? Upon what feature of this cause which was in real controversy, can these appellees found any equity superior to those of the present appellants? The learned judge of the lower court referred to Section 5 as the main matter for consideration in the cause; but in view of the continuous purpose of Mr. William S. Noyes to transfer that section to the company—a willingness repeatedly expressed both orally and in writing,—how can it fairly be said that this transfer was ever in real controversy or could furnish any just basis upon which these appellees may properly found any equity? Throughout this entire litigation, these appellants did nothing which was not proper for the protection of their rights; and since the fundamental claim of the appellees rested upon the asserted fraud, since these appellants were absolved from that alleged fraud, since they steadily resisted the invasion of their rights and

property by a receivership now adjudicated illegal, it is submitted to be impossible to perceive the equity of compelling these appellees to pay for the wrong which has been done to them. It is submitted that one who procures a receivership cannot but act at his peril; he must be charged with the knowledge that he may have to defray expenses created by his own act; he must be held to have contemplated the consequences of his inauguration of a burden which may later be judicially declared to be an unnecessary, useless and wholly illegal burden; both in court and out of it, prudence requires that one should look before he leaps; and it is submitted that no principle of equity justifies either the confiscation or the depletion of a defendant's property in order to defray an expense occasioned by a wrongful situation initiated and continued by his opponent against his persistent and successful dissent.

And how stand the equities as between the receiver and the Presidio Mining Company? The former must, we submit, be charged with full knowledge of the existing and continuing situation; he well knew that the defendants below had opposed any receivership whatever, and that they had appealed from the order of appointment; and when this court announced its first decision of October 27, 1919, he had fair warning of the probable outcome of the controversy. At that time, he had expended for costs of this receivership only the sum of \$14,729.10, allowed in his first annual account—the subject of Exception XII. But, at this point of time, and with the knowledge which he then had, what course lay open before him? He could have resigned

the office on the strength of the warning conveyed by the first decision of this court, or he could have exacted an indemnity for the Presidio Mining Company as a condition of continuing in the office (*Briarfield Iron Works v. Foster*, 54 Ala. 622, 633). On the other hand, he could, and he did, retain the office because, by reason of the views entertained by the learned judge of the court below, it was not feasible for the Presidio Mining Company, by action in the lower court, to dislodge him; and he might have looked forward to a reversal by this court of its original decision in the cause, meanwhile making further drafts upon the company's funds to the amount of \$47,525.64 (Exceptions XIII, XIV, XV and X), of which sum \$4524.88 (Exception X) was actually drawn by him from the company's funds five months after the mandate of this court issued upon its final decision of the cause (Transcript No. 3896, p. 508). Should equitable discretion, we ask, be exercised in favor of the originators of or participants in an illegal act, or in favor of the innocent sufferer by that illegal act?

Upon the whole, we respectfully pray the reversal of the order appealed from, and the issuance of a decree herein conformable to equity and good conscience.

Dated, San Francisco,

October 7, 1922.

Respectfully submitted,

R. T. HARDING,

HENRY E. MONROE,

Solicitors for Appellants.

J. J. DUNNE,

Of Counsel.

No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation),
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

VS.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

BRIEF FOR APPELLEES.

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

HORATIO ALLING,
Of Counsel.

FILED

OCT 21 1922

F. D. MONKTON

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BRIEF FOR APPELLEES.

Foreword.

This litigation has not been conducted solely by Overton and Martin, as has at all times been urged on appeal by appellants, but nine other minority stockholders of defendant Presidio Mining Company have at all times actively aided in the prosecution of this litigation in their own interests. There is on file in this court the petition of these minority stockholders asking leave to intervene, filed February 9, 1920, regularly argued and submitted to this court, but never decided by it (New Tr. 1491-1511).

APPELLEES' MOTION TO DISMISS APPEAL.

In their motion to dismiss this appeal appellees therein stated:

“This suit in equity was originally commenced July 26, 1915, a motion to dismiss the original bill was granted, an application for receivership denied, and twenty (20) days allowed by Judge Maurice Dooling, presiding in the absence of Judge Wm. C. Van Fleet, within which plaintiffs below might file an amended bill and renew their application for a receivership. Plaintiffs below filed their amended bill and renewed their application for an injunction and for a receiver. This matter regularly came on before Judge Van Fleet, and also, at the same time, defendants' new motion to dismiss the amended bill, their objections to injunctive relief or appointment of a receiver. The motion to dismiss the amended bill, and for a receivership, were denied by Judge Van Fleet, and an injunction was granted. Subsequently, trial was had on the merits and decision rendered in favor of plaintiffs and against defendants, and the appointment of a receiver ordered. Said receiver, over the objections of defendants, took possession of the property and mine of the Presidio Mining Company, and Section 5, theretofore held by Wm. S. Noyes, which was adjudicated to belong to the Presidio Mining Company, and operated the same. Said receivership commenced about March 1st, 1918, and terminated May 7th, 1921, during all of which said period said receiver conducted the mining operations of the Presidio Mining Company upon Section 8, and also said Section 5 adjoining, all in Presidio County, State of Texas.

That said receiver duly rendered annual reports of his receivership and after judgment of the Circuit Court of Appeals for the Ninth Circuit, filed in the trial court his fourth and

final account. At the hearing on said final account, said defendants below objected to any deductions being made from the property or funds to be returned by the receiver to the corporation. Said receiver returned to the company approximately \$638,000.00, after payment of all receivership costs, fees, expenses, taxes and improvements, an increase of approximately \$500,000.00 over the amounts of money and securities received by him at the time of the assumption of his receivership. These objections of said defendants below and the answer thereto by plaintiffs, coming on regularly to be heard before the trial court, and being submitted for decision, the court ordered that the said final account of the receiver be approved and the moneys due for compensation to receiver and his counsel, and his expenses, were ordered deducted from the funds in his hands, the residue to be delivered to the Presidio Mining Company, the court reserving its decision as to who ultimately should pay the costs of said receivership, till entry of final decree, when the question of taxation of costs would be determined. No objections were made to the mathematical correctness of the reports filed, nor to the fairness of the fees of the receiver and his counsel, nor to the expenses of the receivership, but their fairness was conceded. From this order, this purported appeal by appellants has been taken."

Appellees' motion to dismiss this appeal is based on six grounds:

1. That it is not an appealable judgment;
2. It is premature; for
3. The question of taxation of costs is within the jurisdiction of the trial court in the first instance;

4. For this court to decide said question would be to anticipate the action of the trial court;

5. That the appellants can suffer no prejudice by dismissal of this appeal, for their rights can be protected on entry of final decree;

6. This court has no jurisdiction over the parties or subject matter at the present time.

Appellants in the trial court in objecting to the allowance of the receiver's account and compensation, conceded the mathematical correctness of the accounts filed (New Tr. 501), and likewise conceded that the amounts paid to the receiver were fair (New Tr. 504). Their position is that no deductions should be made from the amount turned over by the receiver to the corporation, but his compensation and expenses should be taxed against the appellees. In other words, by indirection, an attempt is made to have the trial court thus tax said costs.

The question as to taxation of costs by the opinion and order of the trial court (Tr. 501, 504) was reserved until entry of final decree. We are therefore confronted with the question as to whether or not such an order entered in the trial court is appealable.

Had the challenge been to the fairness of the receiver's compensation, or objections filed as to the correctness of any of the items in the receiver's account, an appeal might lie from the order of the trial court. These two vital elements being removed from the case, we are reduced to the question as

to whether or not this is a taxation of costs, which appellants seek to enforce at this time against appellees, the exercise of which is especially reserved by the trial court until entry of final decree.

The rule as to the appealability of an order such as this in question we believe is fairly stated in *Butler v. Fayerweather*, 91 Fed. 458, at 460:

“Whenever, in a cause, there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary.”

The appeal here is clearly an attempt to obtain a decree of this court coercing the trial court to enter a *certain kind* of a decree taxing the costs of the receivership against the appellees. To do this would be to have this court pass upon the matter before the trial court has exercised its own initial discretion in the premises. We believe that there is no such final order in the instant suit from which an appeal lies, or of which this court of appellate jurisdiction may properly take cognizance.

In a case in which reservation of final action by the trial court had been made and an appeal taken, it was held, *Gunn v. Black*, 60 Fed. 159, at 160:

“The order here in question was certainly not a final decree. It was not based upon, and did not embody, any final decision of any of

the rights of the parties to this suit. It expressly provided that the commissioner after selecting the lands, and executing the deeds of them to the parties, should report his proceedings to the court at the succeeding term. This was an express reservation of final action until the report should be received. The order was a mere direction of the court concerning the method of executing its decree,— an order that would have been entirely within its discretion, if the decree had not been superseded by the appeal. It was not subject to review by appeal in this court.”

Stripped of its cloak, we believe it is clear that the ultimate object of what appellants are seeking to accomplish is to compel the trial court to tax the costs of the receivership against the appellees in the suit at this time, notwithstanding the reservation by the trial court of the entire question of taxation of costs until the entry of final decree. The receiver was ordered discharged by the mandate, and immediately on its being filed in the trial court, the property was returned to the officers of the corporation and his report was filed. The receiver had to be paid, and he was paid out of the *large profits* derived during the receivership. As to who should ultimately pay this expenditure was reserved for decision on entry of the final decree. The mandate itself is silent as to any question of taxation of costs, leaving where it properly belonged, all matters pertaining to said question of costs to the sound discretion of the trial court, and after the said trial court's action taxing costs on entry of final decree, if any of the parties should

be dissatisfied, appeal might be taken for review by proper appellate proceedings.

We believe it is a familiar principle of law that the right to exercise a sound discretion is in the trial court and not in the appellate court.

Stokes v. Williams, 226 Fed. 148, 153, 156;

State v. Nebraska Savs. etc. Bank, 60 Neb. 192; 82 N. W. 625;

Chase v. Fisher, 239 Pa. 545; 86 Atl. 1094, 1095.

Had the appellants desired the trial court to exercise its initial discretionary power taxing costs, or to decide who should pay the receiver at this time, and prior to entry of final decree, it seems to us that a mandamus proceeding should have been resorted to, and not appeal.

Re Sanford Fork & Tool Co., 160 U. S. 247; 40 L. Ed. 414, 416;

Texas etc. Ry. Co. v. Anderson, 149 U. S. 237; 37 L. Ed. 717-719.

In view of the foregoing, appellees respectfully submit that their said motion to dismiss should be granted, with costs to appellees.

REAL ISSUES PRESENTED BY THIS APPEAL.

Considered in the light of a possible denial of appellees' motion to dismiss, this appeal becomes singularly anomalous in that the real issues presented and the principles which must control, have been entirely ignored in appellants' opening brief. The

issues presented and the principles discussed in the opening brief have no bearing upon the case and cannot control decision. The decree of this court to which appellants' contentions, if adopted, would necessarily lead, alone should suffice to clearly indicate the fallaciousness and untenability of those contentions. Should appellants' position be approved and adopted by this court, the determination of this appeal could not take the form of a reversal merely of the order appealed from, but of necessity would lead to an affirmative decree tantamount to the exercise of original jurisdiction. In other words, should the appellants prevail upon this appeal, to give the reviewing decision any effectiveness, this court of strictly appellate jurisdiction would have to enter a decree, not only setting aside and vacating the order of the lower court, but affirmatively requiring the lower court to exercise its discretion in respect to one element of the costs in the case in a definite and particular manner. This necessary result of the adoption by this court of appellants' views and positions would in practical outcome convert this appeal into a writ of mandate, without a mandamus proceeding.

That the above conclusions are correct is quite manifest from the concluding paragraph of appellants' brief, as well as from a number of the exceptions specified therein. Appellants' brief concludes thus:

“Upon the whole, we respectfully pray the reversal of the order appealed from, and the issuance of a decree herein conformable to equity and good conscience.”

Appellants' Exception XVIII is as follows:

"Exception XVIII.

That the court erred in ordering and adjudging that the costs and expenses of the receivership be paid out of the funds in the hands of the receiver in the first instance, *and in not also ordering and adjudging that the Presidio Mining Company and/or the defendants have judgment against the complainants for the full amount of the costs and expenses of the receivership.*" (Page 9 Opening Brief.)

The real issue involved in this appeal then may be stated thus: Is this court of strictly appellate jurisdiction authorized in advance of the exercise by the trial court of its conceded initial discretion in respect to the taxation of costs, to direct the lower court to tax the allowed compensation and expenses of the receiver to the complainants?

Preliminary to the discussion of that single issue involved in this appeal it may be well to briefly outline the fact situation out of which the issue arises. Nothing was before the lower court at the time of the making of the order appealed from beyond the approval of the fourth and final account of the receiver and the making of proper allowances to him for compensation and expenses. It is important to keep in mind the fact that appellants make no objection to the accuracy of any of the receiver's reports or to the reasonableness of any of the allowances made to the receiver at the time of such approvals. The objections filed by appellants to the approval of the final account of

the receiver in last analysis amount to the double demand, first, that the fund be not reduced by the payment of the concededly proper and reasonable allowances for receivership compensation and costs, and second, that to accomplish that end the court in advance of the entry of the final decree and the taxation of costs generally, and as a part of its order of approval and allowance, tax all receivership costs to the complainants. The order made by the lower court amounted to a denial of both of these demands. It provided for the payment of the costs and expenses in the *first instance* out of the fund in the receiver's hands, and expressly reserved for incorporation in the final decree the determination of the question as to taxation of costs.

As to the first demand, the lower court very properly took the position that the receiver, as an officer and arm of the court should not and could not be required to undergo the delay, if not the risk, incident to an order requiring him to look to either of the parties for compensation and expenses growing out of the court custody of the property and funds.

As to the second demand, the court very properly held that appellants were not entitled as a matter of right to require that the taxation of receivership costs should be considered and determined independently and in advance of the general taxation of costs which properly constitute a part of the final decree.

It will thus be seen that the real ground of complaint presented by this appeal is the failure of

the court to accede to appellants' demand that the court tax receivership costs in a certain way in advance of the general taxation of costs. Appellees' reply to this principal complaint is, first, that the lower court cannot be compelled by an appeal from its order to make a piecemeal taxation of costs, and second, that an appeal from the order is not an appropriate method of compelling the lower court to exercise its conceded initial discretion in the matter of taxation of costs, and third, that even if the exercise of that discretion could be compelled by an appeal, in no event could the lower court be compelled to exercise its discretion in a certain way.

In appellees' view this appeal must be determined in the light of two very simple and well established principles, namely:

1. Initial discretion in respect to the taxation of costs is vested in the trial court.

2. Prior to the exercise of that initial discretion by the trial court, "first instance" allowance of receivership expenses and compensation out of the receivership fund is warranted and authorized.

The first proposition is so elementary that it is not likely to be questioned by appellants. If in the present situation it is apparent that there has been no exercise by the trial court of its initial discretion in respect to the taxation of receivership costs, it must follow that this appeal is devoid of any element that is properly reviewable by this court. As to the second proposition, appellees insist that a

“first instance” allowance of receivership expenses and compensation out of the fund is not in any sense a taxation of receivership costs, and therefore is not in any sense an exercise by the trial court of its conceded initial discretion in that behalf. This conclusion is reinforced by the express reservation contained in the order of all matters relating to the taxation of costs until the entry of final decree. The allowance from the fund to the receiver is thus expressly made a “first instance” or purely temporary provision for his compensation and expenses. It constitutes a recognition by the lower court of the fact that quite irrespective of which party shall ultimately be required to pay the costs of the case, the fund itself should be charged primarily with the necessary and proper expenses of its administration. That administration was by the court through the receiver, and the expenses of the administration were the expenses and became the debts of the court itself.

The action of the court through the receiver from the inception of the receivership was aimed at the conservation and protection of the property and resulting funds, and the fact that the defendant corporation was benefited by the receivership in an amount in excess of half a million dollars, indicates that the conservatory purpose of that administration was highly successful.

No citation of authorities should be necessary and none will be given in support of the asserted principle that initial discretion in respect to taxation

of costs is with the trial court. The proposition that a "first instance" allowance of receivership expenses and compensation out of the fund with an express reservation of taxation of costs until final decree, is in no sense a taxation of costs, is equally self-evident. The proposition above advanced that such "first instance" allowance out of the fund is warranted and authorized is supported by the following authorities:

As to the relation of the receiver to the parties and the suit, it was held in *Atlantic Trust Co. v. Chapman*, 208 U. S. 370, 371,

"A receiver is an independent person between parties appointed by the court to receive the rents, issues or profits of lands or other things in question pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed on behalf of all parties and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

To the same effect see *Stuart v. Boulware*, 133 U. S. 82. Similarly in *Union National Bank v. Kansas City*, 136 U. S. 223, at p. 236, it is said:

"A receiver derives his authority from the act of the court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property for that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to

change the title or even the right of possession of the property.”

That the expenses which the court creates in connection with a receivership are burdens necessarily on the property taken possession of, irrespective of the question as to who may be the ultimate owner or who may invoke the receivership is held in

Kneeland v. American Loan Co., 136 U. S. 89, 98;

Atlantic Trust Co. v. Chapman, 208 U. S. 360, 375;

Ferguson v. Dent, 46 Fed. 88, 98.

In *Clark on Receivers*, Volume 1, page 884, it is said:

“A receiver, being an officer of the court and subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. Costs and administration expenses are to be taxed equitably. (Citing *Palmer v. Texas*, 212 U. S. 118, 132; *Kell v. Trenchard*, 146 Fed. 245; *Elk Fork Oil & Gas Co. v. Jennings*, 90 Fed. 767.)”

In 23 *R. C. L.*, Section 116, at page 106, it is stated:

“The courts of most jurisdictions are vested with large discretion in determining who shall pay the costs of receivership, and, according to the justice and equity of each case, may assess the costs of the receivership against the fund, against the applicant or apportion them among the parties.”

In *Sullivan Lumber Co. v. Black*, 48 So. Rep. 870, a case highly analogous to the present situation, where the order appointing the receiver had been vacated, it was held under the doctrine of the *Atlantic Trust Co.* case heretofore cited, that a receiver derived his authority from the act of the court appointing him, and that the effect was to put the property in the hands of the court, and that compensation should not be denied the receiver because the court improperly exercised the jurisdiction to appoint, and that the court should protect him while acting under the order of the court and may award compensation out of the estate or property entrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed. After reviewing all of the decisions in point the court held that a provisional award of compensation out of the fund was warranted and authorized.

In *State of Texas v. Palmer*, 158 Fed. 705, an interlocutory order appointing a receiver was reversed and vacated and the case remanded for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals and with instructions to discharge the receiver and tax all costs of the receivership against the complainant. On appeal to the Supreme Court of the United States (212 U. S. 132), the order of the Circuit Court of Appeals, to the effect that receivership costs should

be taxed to the complainant, was reversed, the court saying in that connection:

“In that court the costs of the receivership were assessed against Palmer, the original complainant. The receivership had gone on pending the proceedings upon appeal, and we are of the opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal Court, and it is so ordered, otherwise the judgment of the Circuit Court of Appeals is affirmed.”

It was held by Judge Learned Hand in re *Hurlburt Motor Co.*, 275 Fed. 62, in relation to a “first instance” allowance of receiver’s compensation and expenses out of the fund, after an adjudication of solvency in a bankruptcy case, that the receiver’s compensation and expenses should be paid in the first instance out of the fund to the extent at least of profits realized by the receiver or improvements arising from profits.

See also *Texas & Pacific Ry. Co. v. Manton*, 164 U. S. 636.

FALSE ISSUES ADVANCED BY APPELLANTS.

Appellants’ opening brief advances three essentially false issues. It is contended in the first instance that the court was without jurisdiction to appoint a receiver and that therefore such appointment and everything done thereunder was void and wrongful, and that that being true, the fund may not be reduced by the allowances included in the order appealed from and the similar orders which

preceded it. It is next inconsistently asserted that even if the court had jurisdiction to make the order, a recognition of the superior equities would require the taxation of receivership costs against complainants. Again, in the third place, it is insisted that it was obligatory upon the trial court at the time of passing upon the receiver's final report, to exercise its discretion as to the taxation of receivership costs apart from and independently of the exercise of that discretion generally in the case.

The recognized principles controlling the question are elementary. Jurisdiction is power to hear and determine.

In the case of *U. S. v. Arredondo*, 6 Pet. 691, 709, 729, it is held:

“The power to hear and determine a cause is jurisdiction; it is ‘*coram judice*’ whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; * * *

(p. 729) It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion.”

It will be conceded, even by appellants, that the lower court had jurisdiction of the parties and the subject matter of the suit. The essence of appel-

lants' contention as to jurisdiction is that there is a third element essential to jurisdiction, and that before a court can be said to have the power to hear and determine, a *case* must be presented which will, under the principles and rules of equity, authorize the court to act in respect to the subject matter. The cases cited by appellants in support of this contention where they are at all pertinent relate to situations where jurisdiction is limited by statute or by the presence or absence of certain jurisdictional facts. None of these things are present in the instant case and indeed the only limitations under jurisdiction here urged relate to the merits, the showing made and the equities disclosed and the sufficiency of showing and equities to warrant the judicial discretion represented by the decision.

The excess of jurisdiction here complained of is in the appointment of the receiver. It stands admitted that the court had jurisdiction of the parties and of the subject matter of the suit and therefore jurisdiction of the case generally, which general jurisdiction necessarily includes the power to do anything and everything that equity and good conscience require. The appointment of a receiver was not the subject matter of the suit. Indeed such a remedy is never primarily the subject matter of a suit, but is always ancillary to the subject matter. Having jurisdiction of the case generally it follows that the lower court had jurisdiction of the purely ancillary matter of the appointment of a receiver. That jurisdiction necessarily included the

power to hear and determine the application for a receiver, and power to determine the question involved a free judicial discretion. There can be no judicial discretion where the court is not free to determine either way under the facts. The contention of appellants that jurisdiction to appoint a receiver is present only in a case where under the showing made a receiver should be appointed, necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him must be said to have exceeded its jurisdiction.

It is a matter of some significance that this question of lack of jurisdiction of the lower court to appoint the receiver is raised for the first time in the history of this case upon this appeal. When the former appeal was before this court from the order appointing the receiver, no suggestion was made by appellants that such appointment represented an excess of jurisdiction.

If appellants by plea to the jurisdiction can make it appear that the order appointing the receiver was void, then it would follow that the lower court would have no discretion to exercise in respect to the taxation of the expenses of the receiver's administration, for the reason that the court's custody of the property by and through the receiver was without right or lawful or equitable warrant. It should be apparent that it was the inherent difficulties of the case

from appellants' point of view that is responsible for their resort to this heroic defensive expedient.

It is true that cases might be conceived and doubtless have arisen in which, by reason of statutory restrictions upon the court's jurisdiction to appoint a receiver, such an appointment under certain conditions would be void for lack of jurisdiction. But there is no such statutory or other limitation upon the court's jurisdiction in the instant case to afford any point to either the discussion given to or the authorities cited in support of the contention in that behalf. The receiver was not appointed until the hearing upon the merits was concluded. The appointment of the receiver at that time represented the balanced judgment and discretion of the lower court in view of the equities disclosed. That the matter is not free from doubt notwithstanding the judgment of this court in the former appeal, is indicated by the fact that the dissenting opinion of one member of this court concurred with the judgment of the lower court as to the propriety of the appointment of the receiver under the showing made.

The attitude of appellants upon the former appeal when they stood by their failure to object, admitting and conceding the jurisdiction of the lower court to appoint the receiver, is consistent with their failure at the time the receiver was appointed to make any attempt to render the appointment ineffectual by refusing to surrender the property to the receiver and resorting to the remedy of prohibition to prevent the lower court from enforcing its

order. In a case where the appointment of a receiver is without jurisdiction, prohibition is recognized as the proper remedy to prevent such order becoming effective (*St. Louis Ry. v. Wear*, 36 S. W. 357, 363). It would seem that if excess of jurisdiction in respect to such an appointment is to be urged, good faith would require a resort to that remedy to prevent the accrual of receivership expenses and the deprivation of a defendant of its property and all other damaging results here complained of. In view of the fact that no resort was had to the appropriate remedy of prohibition in this instance, and the fact that the jurisdiction to appoint the receiver was unchallenged upon the former appeal it would appear that the contention now made as to lack of jurisdiction is an afterthought and is resorted to because it is the only means of attacking the evidently proper and authorized order for "first instance" allowance from the fund.

SUPERIOR EQUITIES.

The second false issue advanced by appellants, is that even if the court had jurisdiction to appoint a receiver, a consideration of the superior equities would require the taxation of receivership costs against complainants. This contention proceeds upon the assumption that it was the court's duty upon the incoming of the receiver's final report and in connection with its approval, to finally determine as to which of the parties should be held responsible

for the expenses of the receivership; or in other words, to finally tax that element of the general costs represented by the receiver's expenses and compensation. That such assumption is entirely erroneous will be urged in the discussion of the next succeeding point.

Whatever may be said as to the court's duty then and there to finally tax that particular element of the costs of the case, the order itself indicates that it was not done, but that an examination of that question was reserved and the exercise of the court's initial discretion in that behalf was expressly deferred until taxation of costs should be had generally at the time of final decree. The question not having been passed upon in and by the order appealed from, and the discretion not having been exercised by the lower court, we maintain that all discussion and consideration of the equities, superior or otherwise, in their relation to the taxation of costs generally, or in respect to receivership expenses and compensation, are inappropriate and without any bearing or point upon the determination of this appeal. If the question was not passed upon and the discretion was not exercised, and the principal complaint of appellants is that it *was not* exercised, what possible purpose can be served by a discussion of the equities disclosed upon the hearing calculated to influence the discretion of the trial court in the taxation of costs? And yet appellants have gone to considerable lengths in an attempt to demonstrate that had the court passed upon the

question and had the court exercised its discretion, it should have taxed receivership costs against complainants.

It is respectfully submitted that in view of the fact that the court expressly reserved and deferred all questions as to the taxation of costs until the entry of the final decree, that all consideration and discussion of the matter of equities, superior or otherwise, as bearing upon the question of taxation of costs, become purely academic and moot. Nevertheless, and lest appellees, by failure to respond to the moot observations of counsel on the other side concerning superior equities, shall be considered to assent to the conclusions drawn, appellees are disposed to submit briefly their views of the controlling equities presented in the case, which should make the taxation of receivership costs to the complainants unthinkable.

It should be remembered that this is a stockholders' suit. Two of the minority stockholders, because of the dominance and control of corporate affairs by the majority, have been compelled, for the protection of their own interests and the interests of other minority stockholders and of the corporation, to institute this action to the end that recovery might be had from some of the majority stockholders of valuable property rights. As a result of their activities in that behalf, the interlocutory decree entered in this case required one of the defendants to deed to the corporation a valuable piece of mining ground, known as Section

5, and also cancelled and terminated a lease to the corporation of said section, under which said defendant was entitled to 50 per cent of the profits arising from mining operations upon the section. The three years of receivership administration of the properties of the defendant corporation resulted in the accumulation over and above all expenses of operation, taxes and receivership costs, of upwards of a half a million dollars. A large portion of that half million was derived from Section 5, one-half of which would have gone to defendant Noyes under the lease, but for the termination and cancellation decreed by the lower court. Upon the former appeal from the interlocutory decree of the lower court, the enforced conveyance of Section 5 to the corporation defendant, as also the cancellation and termination of the lease on said section, were expressly affirmed. By that affirmance and the decree of the lower court which is to be entered in accordance with the mandate of this court, the defendant corporation has been enriched by 50 per cent of the proceeds and profits of Section 5, during the three years of the receivership and upon the entry of the final decree will become the owner of Section 5.

In considering the nature and extent of the recovery for the corporation decreed by the lower court and affirmed by this court, as bearing upon the taxation of costs, it should not be forgotten that at all points and stages of the litigation, from the filing of the original answers of the defendants, and

each of them, to the briefs submitted by them upon the former appeal, the defendants, and each of them, consistently, emphatically and even vehemently denied all right and interest of the corporation in or to Section 5, and resisted the award of the section to the corporation and the cancellation and termination of the lease thereon.

The appellants (including W. S. Noyes and the other majority stockholders) allege in their brief that they have sustained great injury and damage by reason of the alleged wrongful appointment of a receiver. Likewise much has been said about so-called superior equities. In considering this phase of the question, however, on this appeal we believe it might be well to disclose the attitude of said appellants in the litigation of which this appeal is a branch, and particularly their position concerning the recovery of Section 5 for the corporation, which they control.

Complainants in Paragraph V of their amended complaint (Orig. Tr. Vol. I, p. 73) state that the defendant corporation from December, 1912, was the equitable owner and entitled to the possession of Section 5, together with the profits made from reducing the ores therefrom and that in law and equity it was entitled to have the title to said Section 5, transferred to it, and that Wm. S. Noyes was not entitled either in law or equity to the title, possession or control of said section; that he was a trustee of said Section 5.

The defendants in answering the averments of the complaint *denied* that said Presidio Mining Company from December, 1912, or at any other time or at all was or is the equitable owner or entitled to the possession of said Section 5 or entitled to any of the profits made from reducing its ores. They *denied* that said defendant corporation was or is entitled *either in law or in equity to have transferred to it the legal title to said Section 5*, and *denied* that defendant W. S. Noyes is not entitled in law or in equity to the title, possession or control thereof; and *denied* that he is or was a trustee of said Presidio Mining Company, or any other person (Orig. Tr. Vol. I, p. 133).

W. S. Noyes in a separate answer, (Orig. Tr. Vol. I, p. 198) makes the same denials, and both answers pray that complainants take nothing by their amended bill of complaint (Orig. Tr. Vol. I, pp. 154, 218). Complainants' amended prayer referred to by appellants in their brief, prays that recovery be had by and for *defendant Presidio Mining Company* (Orig. Tr. Vol. I, pp. 285-290).

In the assignments of error (Orig. Tr. Vol. IV, p. 1128), the defendants assign as error, that the court erred in finding and decreeing that the Presidio Mining Company at all times has been and now is the lawful and equitable owner of Section 5; and also assign as error (Vol. IV, p. 1130) an order of the trial court that by the final decree the said Wm. S. Noyes *shall be ordered and directed within thirty days from the date thereof to transfer*

said Section 5 to the Presidio Mining Company by proper deed, etc.

It will thus be seen that not only did the individual appellants, as majority stockholders, compel the defendant corporation to resist the recovery of Section 5 against its own benefit, but on the contrary, actively supported the contention of the defendant W. S. Noyes that he alone was entitled to the said section and its profits.

The record likewise discloses that said appellants in their answers below admitted that they knew of the Osborn embezzlements and shortages (which aggregated approximately \$15,000) and acquiesced in the retention of him as secretary at a salary of \$300 per month and concealed said embezzlements from the minority stockholders (Original Tr. Vol. I, pp. 249, 271). These are significant admissions and it is apparent

(a) That the corporation was compelled against its own interests to deny any right to Section 5 because of the majority control held by the individual appellants. We believe it is a familiar principle of law that the position thus assumed by the appellants in their pleadings effectually estops the corporation from claiming any right of conveyance to itself of Section 5. *Sullivan v. Colby*, 71 Fed. 460; *Davis v. Wakelee*, 156 U. S. 680-692.

Through this litigation however the resisted transfer of Section 5 from W. S. Noyes has been decreed to defendant Presidio Mining Company.

(b) That by agreement of the individual appellants, as evidenced by their verified answers, they withheld and concealed from the minority stockholders the fact that one of its officers had embezzled large sums of money from the corporation, and retained said embezzling director-secretary in a position of trust and used his vote, warranting a fair inference that they were not acting in the best interests of the corporation, thereby giving to the lower court the right to substitute its own agent as a receiver to take charge of the corporate affairs pending final decree.

The record in this case conclusively estops the defendants, and each of them, from asserting or contending that the corporation has not been greatly enriched and benefited by the outcome of the suit, or from denying that they have done everything possible to prevent the recovery awarded. It is presumptuous, in the face of this record and of the defendants' consistent attitude in opposition to the relief awarded to the corporation, not only by the lower court, but by this court, to talk about the superior equities warranting and compelling the taxation of the costs of the case to the complainant stockholders, through whose energy and advances the substantial recovery for the corporation has been realized. However, so far as this appeal is concerned from an order in which all taxation of costs was expressly reserved and deferred until final decree, and in which receivership costs were not taxed at all, but only temporarily provided for

out of the fund, the discussion of the considerations which should control the discretion of the court in the final taxation of costs is altogether superfluous.

When the proper time arrives for considering the question of the taxation of the receivership costs, the impropriety of taxing them to the complainants will be urged, not only upon the ground that as a result of the suit the corporation defendant has been largely benefited by the recovery realized, but on the ground that a large portion of the expenses of the receivership was expressly by stipulation concurred in by the appellants themselves. All of the amounts paid as indicated by the four reports of the receiver to F. C. Handy, representative of the receiver at the mine, as well as those paid to the receiver's bookkeeper, were consented to by appellants (see New Tr. Vol. II, pp. 493-500). These amounts aggregate \$21,613.33.

The former appeal did not supersede the proceedings in the case and the allowance to the Master in Chancery for the accounting made upon the court's order during the pendency of the appeal is another element that is constructively assented to by reason of appellants' failure to stay proceedings pending appeal. The amount of the Master's allowance was \$2500. As to the allowance on account of services of Haskins & Sells, certified public accountants, amounting to \$3679.40, it appears from the court's order authorizing their employment that "all of the parties consented thereto" (see New

Tr. Vol. I, p. 181). The aggregate of the various amounts consented to by appellants is \$27,792.73.

It will also be seen by an examination of the record that \$42,620.33 interest was derived from invested funds placed by the receiver during his receivership and disclosed in his reports as follows:

New Tr. Vol. I, p. 270—February 23, 1918,	
to Oct. 31, 1918.....	\$ 1,931.61
New Tr. Vol. I, p. 279—November 1, 1918,	
to Oct. 31, 1919.....	9,725.39
New Tr. Vol. I, p. 302—November 1, 1919,	
to Oct. 31, 1920.....	17,354.15
New Tr. Vol. I, p. 331—November 1, 1920,	
to May 1, 1921.....	13,609.18
	<hr/>
Total.....	\$42,620.33

In addition to the foregoing facts, there is also the saving of salaries, which were not paid, to the company officers during the receivership, including the saving after December 1, 1918, of the salary of E. M. Gleim, superintendent, who was removed by the receiver on or about said date.

TAXATION OF RECEIVERSHIP COSTS ON FILING FINAL REPORT NOT MANDATORY.

As to the third false issue:

Appellants insist that it was obligatory upon the trial court at the time of passing upon the receiver's final report to exercise its discretion as

to the taxation of receivership costs apart from and independently of the exercise of that discretion generally in the case. If the contention be sound and it was the clear duty of the trial court upon the approval of the receiver's report and the allowance of his compensation and expenses, to then and there tax the same as costs to the complainants and not reserve and defer action in that behalf until the taxation of costs generally, then the lower court failed and refused to perform what was under the law a judicial function. In that event mandamus is clearly indicated as the appropriate remedy to compel the court to perform its duty and exercise its legal function. The court did not act as indicated by its express reservation of the matter until final decree, but refused at that time to act in respect to the taxation of receivership costs, and while a writ of mandamus might have enforced such action, if the mandatory predicate be conceded, it is inconceivable how this appeal can be made to serve the same purpose. Appellants complain in this regard, not as to something which the court by its order did, but as to something which the court refused to do. No authorized determination of this matter on appeal can correct the refusal complained of. Appellants evidently sense the incongruity of the situation when they invoke in the concluding paragraph of their brief the issuance of some extraordinary affirmative remedy, which though nameless, shall nevertheless be "conformable to equity and good conscience".

As above stated, it is inconceivable that this court of exclusive appellate jurisdiction should by its decree herein direct the lower court not only to exercise its concededly initial discretion in respect to the taxation of costs piece-meal, and as to the receivership costs, in advance of the taxation of costs generally, but as well require the lower court to exercise its initial discretion in a certain way.

CONCLUSION.

In this suit we have the situation presented of a corporation in the control of L. Osborn and four dummy directors, in December 1912 (New Tr. p. 44). With the exception of the appellants Peat and Osborn, this dummy board was superseded in January, 1913, by appellants Noyes brothers and L. M. Doherty, the reason for the change being shown in the affidavits of W. S. and B. S. Noyes, dated December 16, 1915 (New Tr. pp. 43, 44, 61). This board of directors, the appellants herein, as a majority control of said defendant corporation, concealed the embezzlements of corporate funds by director-secretary Osborn, from the minority stockholders; and continued him in office at his salary of \$300 per month. These facts are admitted in the answers of said appellants (Old Tr. Vol. I, pp. 249, 271). In July, 1915, when this suit was filed the corporation was \$80,000 in debt (Orig. Tr. Vol. I, p. 187). The corporation has paid no dividends since 1905. When the receiver was discharged

on May 7, 1921, he returned to the corporation \$638,000 in cash, sound securities, and bullion in transit. Of this amount over \$500,000 represented net profits accruing from the receiver's management of the corporation during three years two and one-half months, and a large part of which sum came from Section 5, which by the decree has been taken from W. S. Noyes and given to the company, against the resistance of all said individual majority defendants.

These appellants now urge, that the appellees who discovered the embezzlements, stopped the financial leaks in the corporate affairs, recovered Section 5 with its large profits during the receivership, for defendant Presidio Mining Company, controlled as aforesaid by appellants, should be mulcted in all receivership costs incident to the realization of the benefits to said defendant corporation resulting from this litigation, urging as grounds therefor, that such procedure would be fair and equitable in the premises.

On the other hand we have the position of the appellees supported by the other minority stockholders as evidenced by their petition to intervene in this suit, filed in this court February 9, 1920, regularly argued and submitted, with no decision thereon by this court.

But all such considerations are beside the mark here, and become appropriate matters for consideration only upon the exercise of the lower

court's discretion in the matter of the taxation of costs.

In appellee's view this appeal should be dismissed, and if not dismissed, the order of the lower court should be affirmed for the following reasons:

First. That this appeal is manifestly premature in that the lower court has not as yet acted in any way in respect to the taxation of costs; the "first instance" allowance from the fund being a mere temporary provision for the court's costs out of the profits of the court's receivership administration.

Second. That should the ultimate taxation of receivership costs be unsatisfactory to appellants they have a clear remedy by appeal from the final decree, in which such taxation will be incorporated.

Third. That prior to the exercise by the lower court of its initial discretion as to the taxation of receivership costs, there is no occasion, and, indeed, no authority for this court to consider or determine the superior equities which should control a judicial discretion in the taxation of the costs in question.

Dated, San Francisco,

October 21, 1922.

Respectfully submitted,

WILLIAM DENMAN,

WM. F. ROSE,

Solicitors for Appellees.

HORATIO ALLING,

Of Counsel.

No. 3896

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation),
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

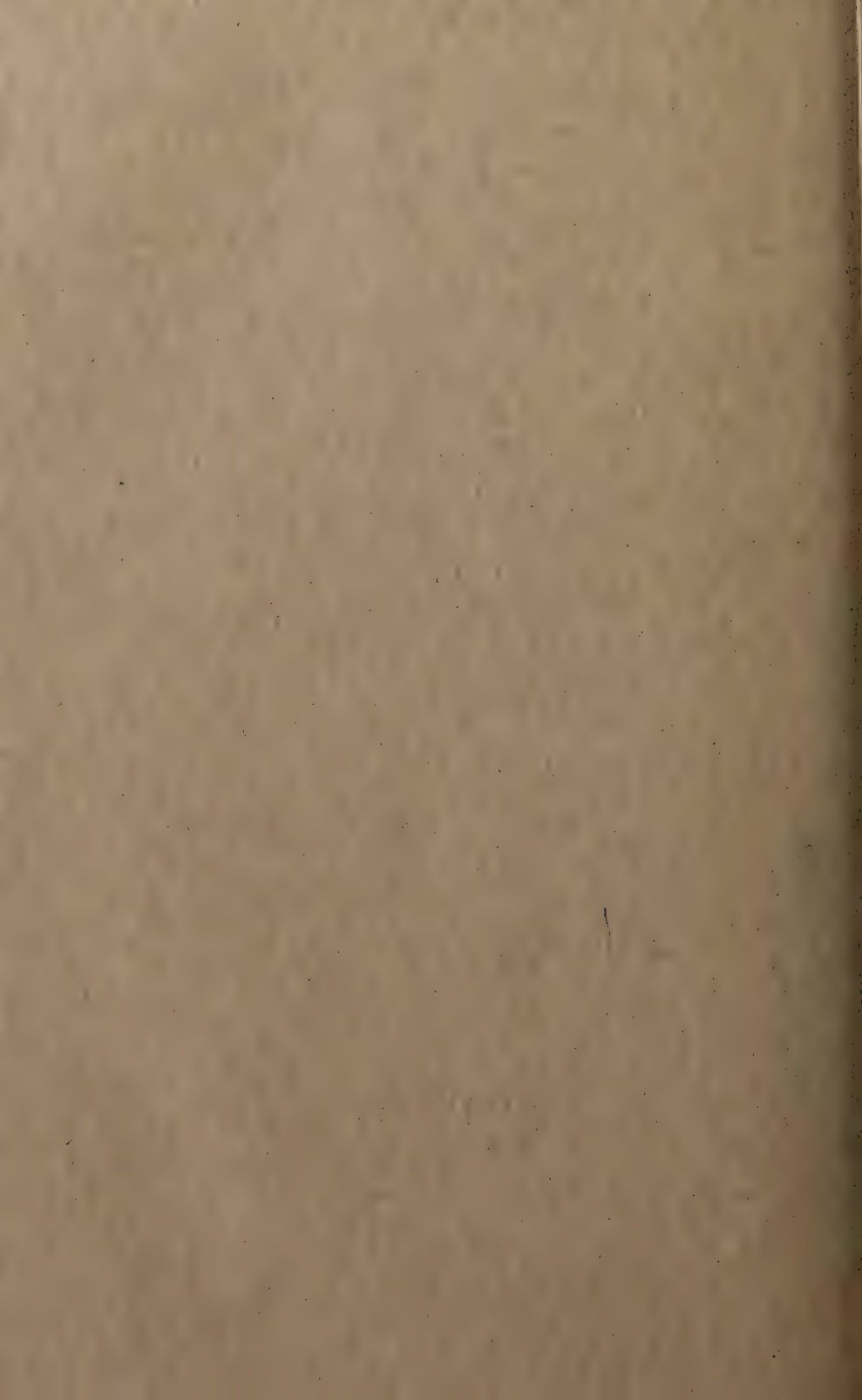
W. S. OVERTON and CARL A. MARTIN,
Appellees.

REPLY BRIEF FOR APPELLANTS.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Appellant.

J. J. DUNNE,
Of Counsel.

FILED
DEC 23 1922
F. D. MONCKTON,
CLERK.



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Appellants,

VS.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

REPLY BRIEF FOR APPELLANTS.

First.

THE BRIEFS HEREIN.

The briefs filed herein on behalf of the appellees, and on the part of the receiver, furnish no answer to the contention presented by the appellants: those briefs lack that systematic presentation which is the product of clear thinking: much that is diffuse and irrelevant appears in them; and, especially when read in the light of prior decisions of this court in this litigation, furnish no equitable reason why the expense of the receivership should be charged against the party who successfully resisted it.

After reading these briefs we find ourselves compelled, by reason of their diffuse and unsystematic

character, to present a running commentary upon their contents; and if that commentary itself should be found to be desultory, that characteristic should be attributed to the desultory nature of the material with which we are dealing. These briefs are subject, we think, to well founded criticism; and, unfortunately, the criticism which we beg leave to offer is provoked, not only by the contentions themselves which are presented in these briefs, but actually by assertions made therein which we believe to be unsupported by the record.

"one-
man case."

On opening the brief for appellees and on the first page thereof we find the assertion made that

"this litigation has not been conducted solely by Overton and Martin, as has at all times been urged on appeal by the appellants, but nine other minority stockholders of defendant Presidio Mining Company have *at all times* actively aided in the prosecution of this litigation in their own interests."

We are unable to find that this typical statement is justified by the record; and we challenge the appellees to name the page in the record of the trial court, or the page in the record on appeal prior to the application for the rehearing, which shows that a single stockholder, Overton apart, at any time "*actively aided*" in the prosecution of this litigation. The truth is that throughout the hearing before the trial court, throughout the argument of the original appeal, and up to the granting of the order for the rehearing, the solitary stockholder who displayed any activity in the prosecution of this litigation was Overton, Martin being conspicuous by his silence and inactivity.

The statement is then made that

“there is on file in this court the petition of these minority stockholders asking leave to intervene, filed February 9, 1920, regularly argued and submitted to this court, but never decided by it”;

“Army
Minority
Stock-
holders’ ”
Petition.

but here, characteristically, only part of the story is told. The facts in this connection are all matters of record, and misleading half statements concerning them should not be tolerated. The truth is that when these present appellants filed their opening brief upon the original argument of the main case, they called attention, in a most pointed way, to the litigious ubiquity of Overton and the impressively significant silence of all the other stockholders, including even Martin (Op. Brief, pp.2-7); that aspect of the case was discussed by counsel in the various briefs; and it was adverted to in the original opinion which was handed down by this court on October 27, 1919. After this came the “petition for a rehearing on behalf of appellees W. S. Overton and Carl A. Martin”, which application, so limited, was filed on February 3, 1920. By this time it began to be apparent that the solitude of Overton should be, nominally at least, to some extent relieved; and spurred by the criticisms of the present appellants, he and his counsel prepared and filed the so-called

“petition of army minority stockholders group to intervene as parties herein and show their authorization, support and ratification of the litigation and for the re-entry of Col. Carl A. Martin as a party to the action”.

This petition was filed on February 9, 1920, but its history did not end then. If it were true that these petitioning army minority stockholders had “at all times actively aided in the prosecution of this litiga-

“tion”, as asserted in the brief under consideration, it is difficult to explain why this petition should have been filed at all; and if the claims of the appellees in this present brief be founded in fact, it is equally difficult to explain why, if Martin were the active participant which he is now asserted to have been, any petition for “the re-entry of Col. Carl A. Martin as a party to the “action”, should have been filed at all: the filing of this petition was of itself a distinct admission that the sole, active promoter of this litigation was Overton. This petition of these army minority stockholders was not signed or verified by the “army minority stockholders”, or apparently by any of those whom the solicitor referred to as having seen “in the flesh” (Trans. 3253, p. 1505, ad finem). On the contrary, this petition was verified by Constance Mills Overton, Overton’s wife, and by no other person whomsoever, and that, too, without any statement that she was authorized so to act by a single other minority stockholder, or that in any way she was acting on behalf of any one of them. But this is not all. On February 9, 1920, this army minority stockholders’ petition was ordered submitted for consideration and decision, but, on February 18, 1920, and before any action had been taken thereon, a dismissal of this petition was filed on behalf of Constance Mills Overton, trustee for the stock of Belle Congdon, and not in her own behalf, Jennie S. Adler and Mary L. McKittrick. Thereafter, and on May 21, 1920, the rehearing was granted, following which the whole case was rediscussed, and an opinion handed down which, while not referring in so many words to this army minority stockholders’ petition, nevertheless disposed

of every essential feature of the cause. But no other, further, different and/or additional application was made to the Circuit Court of Appeals in the matter of the aforesaid petition of said army minority stockholders, and apparently, so far as that court at least was concerned, the petition seemed to have been abandoned. Following this, the present appellees applied to the Supreme Court of the United States for a writ of certiorari; and for the purpose of that application filed their Praecipe for the transcript of record, which Praecipe, among other things, included the petition of these army minority stockholders for leave to intervene, notice of the hearing thereof, order of submission thereof, and the dismissal of said petition as to the above mentioned persons.

Thereafter, and in the Supreme Court of the United States itself, these "army minority stockholders" petitioned for leave to intervene, as petitioners along with Martin and Overton, in petitioning for the writ of certiorari applied for; but on April 25, 1921, *and with the petition of these army minority stockholders before them*, the Supreme Court of the United States denied said petition for said writ of certiorari. In brief, the petition of these minority stockholders—if it was the petition of any minority stockholder aside from Constance Mills Overton—originated in the Circuit Court of Appeals, received similar treatment from that court and the Supreme Court of the United States, and by no means supports the assertion in the appellees' brief that these minority stockholders "*at all times* actively aided in the prosecution of this litigation."

The brief under consideration then purports to quote on pages 2 and 3, the motion to dismiss the present appeal. But even here one finds unfortunate misapprehensions of the record. For example, it is stated on page 2 that Section 5 was "adjudicated" to belong to the Presidio Mining Company, but we protest against the ambiguity of this phrase, and the false impression which it creates by ignoring the original and continued expressed willingness and desire on the part of Mr. Noyes to transfer Section 5 to the Presidio Mining Company whenever that company was ready to pay its purchase price and incidental moneys,—a position fully recognized even in the decree of the learned judge of the trial court. So, on page 3, speaking of the views of the learned trial judge which brought about the present appeal, it is stated, quite in conformity with the reiteration of the phrase "taxable costs" throughout the brief under examination, that the learned trial judge took the position that the question of taxation of costs would be determined upon the entry of the final decree; but, as we read his memorandum opinion (page 503, Trans. 3896), nothing whatever was said about "taxation of costs", or "taxable costs", and all that was said was that the ultimate liability for the expense of the receivership might be reserved until that question properly arose.

On page 3, and elsewhere throughout appellees' brief, the claim is made that the order appealed from is not appealable; but we urge that the order complained of is appealable, because final quoad the receivership.

It is submitted that it is not a necessary condition of appealability that a judgment should be final in the sense that it disposes of all possible issues in a cause, but it is enough if the judgment or order determine finally a distinct phase of the pending litigation. This receivership, however, was a phase of this litigation distinct from its general subject,—so distinct indeed that the litigation could well have been carried forward to an ultimate decision, and was in fact so carried forward in the court *a quo*, without any receivership whatever; and the accuracy of this proposition becomes apparent from even the most general consideration of the nature of a receivership. A receiver is merely a ministerial officer; he is not a party in a full sense (*Youtsey v. Hoffman*, 108 Fed. 693); and he has no powers other than those conferred upon him by his order of appointment. He is appointed on behalf of all parties who may establish rights in the cause (*Thom v. Pittard*, 62 Fed. 232), but on behalf of no particular interest (*Pa. Steel Co. v. Ry. Co.*, 198 Fed. 721; *Central Trust Company v. Railway Company*, 59 Id., 523). Although after his appointment neither the owner nor any other party can exercise acts of ownership over the property, yet neither party is responsible for his acts (*Milwaukee, etc. Ry. v. Sutter*, 69 U. S. (2 Wall.) 519). The custody of such an officer is that of the court, but it leaves the rights of the parties concerned to be determined and controlled by the ultimate decree of the court: the appointment does not change the title or rights of possession of the property, but puts it into the receiver's cus-

tody for the benefit of the party ultimately entitled (*Union Bank v Bank of Kansas City*, 136 U. S. 223): no lien on the property is affected by the appointment (*Pa. Steel Co. v. Ry.*, 198 Fed. 721); nor does such an appointment work a dissolution of the corporation, but only suspends the functions of its officers to the extent provided in the order of appointment (*State v. Ry.*, 17 N. E. (Ind.) 909). A receiver has no power without the previous direction of the court to incur any expenses except those absolutely necessary for the preservation and use of the property (*Cowdrey v. Ry. Co.*, 93 U. S. 352); and it is the duty of a receiver appointed by a federal court to manage the property according to the laws of the State wherein the property is situate (Judicial Code Sec. 65). Prior to *Great Western Mining Company v. Harris*, 198 U. S. 561, suits by a receiver in a foreign jurisdiction were sustained, but since the decision was handed down in the case last cited, the rule appears to be that a receiver cannot sue outside the jurisdiction of his appointment, except, perhaps, under special circumstances (*Burnheimer v. Converse*, 206 U. S. 516): nor, prior to the Act of March 3, 1889, could a federal receiver be sued without the consent of the appointing court,—the Act of March 3, 1889, extending, however, to any court of competent jurisdiction, state or federal, and not merely to the appointing court (*McNulta v. Lochridge*, 141 U. S. 327).

It results from the general nature of a receivership, that the receiver, being a mere ministerial agency of the court, can exercise no commanding control over

the litigation itself or over the rights, defenses or legal policies of the parties interested: as suggested by Mr. Justice Wayne, "when appointed, very little discretion is allowed to him", and

"he has at most a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act" (*Booth v. Clark*, 58 U. S. (17 How.) 322, 330, 338);

as pointed out by Mr. Justice Swayne,

"he has only such power and authority as are given him by the court, and must not exceed the prescribed limits" (*Davis v. Gray*, 83 U. S. (16 Wall.) 203, 218; *Tibbets v. Cohn*, 116 Cal. 365);

and

"the authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done" (*In re McKenzie*, 180 U. S. 536, 551).

So distinct is a receivership from the main body of the litigation, that it may fairly be regarded as a mere ancillary or provisional remedy in those cases in which it may properly be considered (*Vila v. Grand Island Electric Company*, 4 Ann. Cas. 59): such an appointment is merely auxiliary to a pending action (*Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94); it is classified by the California Code of Civil Procedure as a "provisional remedy" (Part 2, Title 7):

"the authority conferred upon the Court to make the appointment necessarily presupposes that an action is pending before it, instituted by someone authorized by

law to commence it'' (Hobson v. Pac. States Mer. Co., 5 Cal. App. 94, 101);

and so distinct indeed from a receivership are the merits of the controversy itself that it has even been held that upon an application for the appointment of a receiver the merits will not be inquired into (*Sheldon v. Weeks*, 2 Barb. 532; *Contro v. Gray*, 4 How. Pr. 166; *Higgins v. Bailey*, 7 Rob. 613).

It may be added that a litigant is under no compulsion to apply for a receiver, nor is the chancellor obliged to appoint one merely because an application has been made therefor; and as suggested in our former briefs in dealing with this subject matter, authority of the most respectable character supports the proposition that where an injunction will sufficiently serve the purpose, a receiver will not be appointed (See also, *Fischer v. Sup. Ct.*, 110 Cal. 129, 138; *Tibbets v. Cohen*, 116 Id. 365, 369; *Hobson v. P. G. Merc. Co.*, S. C. A. 94, 101-2). Provision has always been made for an appeal from a decree of a chancellor determining the main body of the litigation and settling therein the fundamental rights of the respective parties: but though this provision was made with reference to the main body of the litigation, yet, at one time, no appeal was permitted from the action of the chancellor in appointing a receiver; and it was only by the legislation now incorporated in the Judicial Code that an appeal to the Circuit Court of Appeals lies from an interlocutory decree appointing a receiver. To sum it all up, a receivership is not inevitable in an equity suit: it is granted or denied in particular cases as the

proper application of proper principles to proper facts may, in the exercise of a sound judicial discretion, suggest to a chancellor that such a drastic step should or should not be taken; the appointment of a receiver is often a debatable feature in a cause wherein other features are conceded: in very many cases, general relief has been allowed, but a receivership denied; and where an appointment has been made, the receivership has its own origin, its own activity, its own termination—it is purely adjective and a feature apart from the main case.

This proposition that a receivership is a feature of litigation quite apart and distinct from the main case in the course of which a receiver is appointed, could have no better illustration, we think, than the history of the receivership in the case at bar. To no extent and in no degree was that receivership interwoven with the issues framed by the bill and answer: it was not even in existence during the hearing and determination of those issues; and it had no existence whatever until after those issues had been determined by the learned judge of the trial court. In a word, the main case was heard and determined wholly independently of any receivership whatever.

If the foregoing suggestions are sound, and we believe that they are, it must be plain that the order appealed from was final as to the receivership phase of this litigation: it wound up that receivership: it discharged the receiver: it exonerated his bondsmen: it undertook, against the protests of these appellants, to dispose of money of the company which was re-

tained by the receiver when he made delivery to the company of the remainder of its property pursuant to the decree of this court, after the writ of certiorari had been denied by the Supreme Court; the order appealed from closed that chapter of this long history which was concerned with this receivership; and such a final order, we submit, is an appealable order. We submit that a decree is final which completely determines an ancillary matter distinct from the general subject of litigation.

Hill v. Chicago Ry., 140 U. S. 54;

Stewart v. Masterson, 131 Id. 159;

Potter v. Beale, 50 Fed. 860;

Standley v. Roberts, 59 Id. 839, 840;

Rust v. United Water Works Co., 70 Id. 132;

Tuttle v. Claflin, 88 Ill. 122;

Edgell v. Felder, 99 Id. 324;

Sanders v. Bluefield Water Works Co., 106 Id. 587;

Eau Claire v. Payson, 107 Id. 552;

Kemp v. National Bank, 109 Id. 48;

Hooven Co. v. John Featherstone Sons, 111 Id. 81;

In re Michigan Cent. Ry., 124 Fed. 727, 733.

Let us, however, examine this question from a different point of view. The fourth and final account of the receiver prayed

“that said report and account be approved and that the fees of himself and his attorney since the 31st day of December, 1920, as such receiver, and for closing the affairs of said trust as appears by this report, be fixed by the court and ordered paid from the balance of said funds now in his hands” (Trans. of Records No. 3896, p. 335);

and in response the order appealed from was made, wherein and whereby

“said balance now remaining in the hands of said receiver be divided between the said receiver and his counsel”
(Trans. No. 3896, p. 506),

and wherein and whereby said balance was equally divided between the receiver and his counsel, and wherein and whereby it was further ordered “that said receiver be and he is hereby discharged and bondsmen exonerated”. Such being the application of the receiver, and such the order made pursuant to that application, let us, for the purpose of testing the appealability of the order in question, assume that the order, instead of making any award to the receiver and his counsel, discharging the receiver and exonerating his sureties, should have denied the prayer of the receiver’s application, should have made him no award whatever, and should have refused to discharge him or exonerate his sureties: in such an event, could the receiver have appealed from such an order? And if he could have appealed from such an order as we have supposed, upon what principle, consistent with equality as applied to the interpretation of the law, should the present appellants be denied a right accorded the receiver? If, in the interpretation of the law relative to appeals from orders winding up receiverships, the receiver be allowed an appeal from an adverse order dealing with his charges against the fund, how in fairness may a similar right be denied those who seek to prevent the reduction of the estate by the allowance of charges which the objectors consider illegal? But we submit that had the present order been adverse to the receiver,

he could have appealed from it: this view necessitates and presupposes the appealability of the order: why, then, where, against objection and exception, the order is favorable to the receiver, should not the opposing parties have the correspondent right? To illustrate our meaning: in the progress of a suit for the foreclosure of a mortgage, one Hinkley was appointed receiver and under the final decree the mortgaged property was sold and subsequently conveyed to the purchasers. Upon a settlement of the accounts of the receiver a balance was found due from him of a considerable sum of money, for which a decree was entered directing its payment into court on or before a fixed date, and thereupon the receiver prayed an appeal "*from the decree against him*", which was granted. Thereupon, the complainants in the action moved to dismiss his appeal on the ground that he was not a party to the suit, but the motion to dismiss was denied, Waite, C. J., remarking:

"This seems to us to be decisive of this motion. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. In this case, the final decree has been given, and the case is properly here upon the appeal as prayed and allowed. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. Everything can

be closed up in the court below, in accordance with the decree which has been entered in the cause, except the distribution of the money claimed from the receiver.”

Hinckley v. Gillman, etc. Ry., 94 U. S. 467, 469.

The attitude here revealed suggests something more than the right of a receiver to appeal from an adverse decree,—a right which we contend carries with it a correspondent right in those who resist the claims of a receiver. The view of Mr. Chief Justice Waite presupposes a marked distinction between the main body of the litigation, involving the title to the property and the possession under the sale, upon the one side, and the receiver’s accounts upon the other side: in other words, we have here, again, a recognition of the proposition that a receivership is a phase of litigation quite separable and distinct from the general subject of the litigation. So, in *Hovey v. McDonald*, 109 U. S. 150, a case cited in the brief filed herein by the attorney for the present receiver (page 1). In that case, one was entitled to a fund in the hands of an agent of Great Britain, and his assignee in bankruptcy filed a bill against the claimant and a third person who claimed the fund as a purchaser, to restrain them from collecting the money: after a restraining order had been issued in the cause, a preliminary injunction was issued, and a receiver of the fund was appointed. Meanwhile, another person commenced suit in the same court against the claimant of the fund and the purchaser of the fund, claiming one-fourth of the fund, and obtained a preliminary injunction restraining them from collecting more than three-fourths. Subsequently, an order

was made in the suit of the assignee in bankruptcy in which after reciting that it was made by consent of the parties in both suits, both restraining orders were vacated, payment of one-half of the fund was ordered to the one who claimed the fund as purchaser discharged of the claims of the plaintiffs in either suit, and the other half was ordered to the receiver who was directed to hold it subject to the claims of the assignee in bankruptcy and of the plaintiff in the second action—the claimant of one-fourth of the fund. This decree was carried out. Both of these bills were demurred to, and in each suit a decree of dismissal was entered at special term on the demurrer. In the suit of the assignee in bankruptcy an appeal was taken and the decree was affirmed. In the suit of the claimant of the one-fourth of the fund the decree of dismissal was entered on June 24, 1875, and an appeal was taken on the same day. On the 28th of the same month, the decree was amended by adding an order that the receiver pay the fund to the person who had claimed it as purchaser—the same person who was co-defendant in the action of the assignee in bankruptcy, and notice thereof was at once given to the receiver with a demand of payment. The receiver asked the court what he should do and the court directed him to obey the decree, whereupon he surrendered the fund to the person who claimed it as purchaser. The appeal of the plaintiff in the second action was perfected on July 12th, by filing an appeal bond, the judgment was reversed on appeal, and an order was entered that the receiver should pay the money into court. Failing to do this he was adjudged

in contempt and an order issued for an accounting. An auditor took testimony and returned it with a report that the receiver had done his duty by paying the money to the person who claimed it as purchaser, pursuant to the amendment to the decree made on June 28, 1875. When this report was confirmed, an appeal was taken from that decree by those who had claimed the one-fourth of the fund. The receiver moved to dismiss the appeal, on the ground that he was not a party to the suit, but the Supreme Court held that although he was not a party to the suit, yet he was the principal party to a side issue which had arisen in it, which was appealable, and that the judgment upon it was final, and the appeal was properly taken. In this connection, it will be noted that while in *Hinckley v. Gillman, etc. Ry.*, supra, it was the receiver who appealed from what he regarded as an adverse order affecting the receivership, yet, upon the other hand, in *Hovey v. McDonald*, the appeal by those in opposition to the receiver, taken by them from what they regarded as an adverse order affecting the receivership, was sustained, and the attempt to dismiss that appeal failed to succeed: in other words, in the first of these cases it was the receiver who appealed from an adverse order affecting the receivership, but in the latter of these two cases it was a party litigant, other than the receiver, who appealed from an adverse order affecting the receivership; and reading together these two cases, comparing and contrasting them, full support is found, we believe, for our view that to grant the right of appeal to the receiver, but to deny the correspondent right to those who entertained views

antagonistic to those of the receiver, would be to put upon the law an interpretation not consonant with fair play or equality. And in the course of the opinion in the case last cited, the Supreme Court, through Mr. Justice Bradley, took occasion to say:

“The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion cannot prevail. The proceedings instituted by the order requiring the receiver to file his account, and the subsequent reference of that account to an auditor, and the exceptions thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a side issue in the cause, in which the complainants on the one side, and the receiver on the other, were real and interested parties. *The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of the receiver.* We have so often considered cases of this sort, arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter into a detailed discussion of the subject at this time. The receiver, though not a party in the principal suit, was an officer of the court appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to. It is only necessary to refer to some of the cases that apply to the subject. It will be found fully discussed in *Blossom v. Milwaukee Railroad Company*, 1 Wall. 655; *Butterfield v. Usher*, 91 U. S. 246; *Trustees v. Greenough*, 105 U. S. 527; and *Hineckley v. Gilman, Clinton and Springfield Railroad Company*, 94 U. S. 467. In the case last cited a decree was rendered against a receiver, directing him to pay into court a certain sum of money, being the balance found due from him on the settlement of his accounts. He appealed from this decree, and his right to appeal was sustained by this court. This case is a direct authority to show that the receiver in the present case, had the

decree been against him, could have taken an appeal; *and, if he would have had a right to appeal, surely the opposite parties have the same right.*"

Hovey v. McDonald, 109 U. S. 150, 155-6.

There seems, therefore, to be no reasonable doubt concerning the right of appeal from a decree or order winding up a receivership. And in this connection we venture to recommend for analysis the case of *Bosworth v. Terminal Railroad Association*, 174 U. S. 182, merely remarking by the way an error in the third paragraph of the syllabus wherein the reporter speaks of "the rights of *both* parties to the suit", notwithstanding that the language of the opinion proper is "the rights of *either* party to the suit"; but, as aptly remarked in *Hovey v. McDonald*, "if he (the receiver) would have the right to appeal, surely the opposite parties would have the same right" (page 156). And in this connection it may be added that our contention that the receivership and its associated business are distinct from the general subject of the litigation—a general subject covered fully and circumstantially in the previous opinions of this court,—are as distinct as the intervention in *Gumbel v. Pitkin*, 113 U. S. 545, or in *Trust Company v. Grant Locomotive Works*, 135 Id. 207, 224-5, is further emphasized by the proposition that while a receiver has no right of appeal from orders which do not affect him personally, or which determine the rights of creditors or claimants *inter sese*, yet where a claim is asserted which involved an increase or diminution of the estate of which he is the receiver, or where an order does affect him personally, he may appeal: but

once concede to him a right of appeal, and such concession necessarily presupposes not only finality upon a matter distinct from the general subject of the litigation, but also the corresponding right in the other party or parties.

Final Decree
in Main Case
Unneces-
sary.

We urge, further, that the order now appealed from, being final quoad the receivership, the present appeal is timely, and these appellants were not required to await the entry of a final decree in the main case in which this terminated receivership was an incident or episode.

This proposition, we believe, necessarily results from the proposition that the order appealed from terminated and wound up a phase of this litigation distinct and apart from the main case, not necessary to the main case, and injected therein for the benefit of complainants already fully protected by the injunctive process of the court, and after the issues in the main case had been fully heard and determined.

The Supreme Court of Montana points out that the lower court is not precluded

“upon a discharge of the receiver *before the conclusion of the action*, as was the case here, from fixing his compensation, and adjudging the payment thereof against the party at whose instance he was wrongfully appointed” (*State v. District Court*, 72 Pac. (Mont.) 713).

In *Rochat v. Gee*, it was conceded by the court that

“a party aggrieved by an order of the court made before judgment allowing the final account of a receiver, may appeal *without waiting for a final judgment in the case*” (91 Cal. 357).

And in *Grant v. Superior Court*, 106 Cal. 324, the court said:

“The only order which the court proposes to make is one fixing the amount of the compensation. Such an order cannot, by itself, injure anyone; but, if in addition to the order fixing the amount, the court should order it paid out of the fund in the receiver’s hands, such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund (*Trustees v. Greenough*, 105 U. S. 527; *Tompson v. Huron Lumber Co.*, 5 Wash. 527). Or, if the court should order either the original or substituted plaintiff to pay the compensation allowed, that would be a final judgment from which an appeal would lie. If this order should not be appealable by reason of its amount being insufficient to confer appellate jurisdiction upon this court, it could be reviewed either upon certiorari or upon an appeal from the order settling the receiver’s account; and any attempt to enforce its payment by suit could be defended upon the want of jurisdiction in the court to make the order. There is nothing in conflict with this view in anything decided in *Rochat v. Gee*, 91 Cal. 355. The order held in that case to be nonappealable was merely a partial settlement of a receiver’s account, and was not by its terms made payable by any party, or enforceable against any party by execution, or payable out of any fund. In other words, it lacked one essential element of a final judgment. *And it was conceded in that case that there might be an appeal by a party aggrieved from an order allowing the final account of a receiver before a final judgment in the action as between the original parties.*”

Grant v. Superior Court, 106 Cal. 324, 325-6.

It is then claimed in the brief filed herein for the appellees, though apparently not in that filed herein for the receiver, that the present appeal is premature for the reason that “the question of taxation of costs “is within the jurisdiction of the trial court in the

Present
Appeal Not
Premature.

“first instance”: but we respectfully insist that neither the compensation of a receiver, nor his attorney’s fees, can properly be described as “taxable costs”. If we understand our opponents correctly, their contention seems to be that this subject matter of taxable costs can be disposed of only by a final decree, but our opponents are singularly reticent as to their conception of a final decree—although they use the phrase “final decree” with great frequency, yet they omit to advise us as to whether they mean by that phrase a final decree upon the merits of the main case, or a final decree in the matter of the receivership episode. Our views, however, as to the finality and appealability of the order now complained of have already been stated, and need not be repeated in this place.

Taxable
costs.”

But in this connection another striking reticence of appellees should be brought to the attention of the court. If there be a phrase which appellees have worn threadbare throughout their brief, it is the phrase “taxable costs”, but the reticence of which we complain rests is this, that from the beginning of their brief to the end thereof no real light is shed by them upon the meaning of this phrase. We are unable to discover what the appellees have in mind by the use of this phrase: nowhere do they attempt anything like an examination of the meaning of the phrase; and still less do they attempt any definition thereof. In the course of their brief appellees speak of what they call “false issues advanced by appellants” (page 16), and at page 6, they speak of stripping appellants’ object of its cloak, but we think that, instead of indulg-

ing in this sort of phraseology, had the appellees taken the trouble to define, with something approaching adequate precision, the meaning of the phrase "taxable costs", their brief would have been much more assistance upon this appeal than we can conscientiously concede it to be.

We understand that

"costs are those expenses incurred by parties in prosecuting or defending suits or proceedings at law or in equity and which are recognized and allowed by law" (5 Ency. Pl. and Pr. 106):

they are statutory allowances reimbursing a party for expenses incurred in prosecuting or defending an action; and they have reference to the expenses of litigation as between the parties (*Williams v. Flowers*, 7 So. (Ala.) 439; *Bohart v. Anderson*, 103 Pac. (Okla.) 742). It is common ground that prior to the statute of Gloucester (6 Edward I), costs were unknown: they have been and they are purely statutory, and cannot be imposed or recovered except where authorized by statute (*Tesla Electric Co. v. Scott*, 101 Fed. 524; *O'Neil v. Kansas City Ry.*, 31 Id. 663); and statutes regulating costs seem to be considered as penal in their nature, and to be strictly construed (5 Ency. Pl. & Pr. 111; 11 Cyc. 27; 7 R. C. L. 782). State statutes regulating costs are not binding in the federal courts (*O'Neil v. Kansas Ry.* supra), and while, prior to the Act of February 26, 1853, taxation of costs in the various districts conformed to the practice of the State in which the District was situated, yet since the enactment of that statute, this rule applies only with respect to items of costs not specially covered by

the enactment (*Primrose v. Fenno*, 113 Fed. 375). It is a rule of almost universal application that the prevailing party is entitled to costs: but in this connection it is proper, we think, to point out that while in courts of equity the allowance of costs is within the court's discretion, yet the general rule in suits in equity, as well as in actions at law, is that the prevailing party is entitled to costs (*Warren v. Burnham*, 32 Fed. 579; *Hovey v. Stephens*, 12 Fed. Cas. No. 6746; *Hunter v. Marlboro*, Id. No. 6908); and in exercising this discretion, this rule will be applied unless the losing party can show that equity requires a different judgment (*Clark v. Reed*, 28 Mass. (11 Pick.), 446). Here, however, a related inquiry becomes pertinent. If costs are to go to the prevailing party, who is the prevailing party, and as to what should he prevail? In this connection it will be observed that what are here claimed to be "taxable costs" are not such in the sense of any accepted definition of that phrase, but include simply the compensation of a receiver, and his attorneys' fees,—in other words, expenditures claimed to have accrued in the course of the separable and unnecessary "side issue" (*Hovey v. McDonald*, 109 U. S. 150), which "side issue" has terminated in its own final decree, and as to which final decree the appellants were the successful parties. The "taxable costs" now in contestation are not by any means those of the action at large; they are those only of a severable branch of that action; and as to that branch, these appellants prevailed, this appellate court sustaining them and ousting the appellees' re-

ceiver. No other or different expenditures are here involved save and except those associated with this receivership (*Kell v. Trenchard*, 146 Fed. 245); and if the rule be applied, as we think it should be applied, that the prevailing party is entitled to costs as against the losing party, it would seem to follow that a reversal should here be ordered.

It is often said that a complainant who brings a groundless suit, or makes a groundless application, or prosecutes useless litigation, will be required to pay costs (11 Cyc. 35): but if this be so, upon what equitable principle are costs, whether "taxable costs", or otherwise, to be charged against those who defeat the groundless proceeding in which the "costs" were incurred, or as to which the "costs" are demanded? So far as this receivership is concerned, he who instigated it must have known that he was not properly entitled thereto, especially since the first opinion in this cause was handed down; and since he was defeated, no equitable reason exists why those who defeated him and those associated with him in the receivership, should be called upon to pay the expense now claimed under the guise of "taxable costs" (compare *Howard v. Bennett*, 72 Ill. 297). And so, too, with the unnecessarily expensive receivership itself: that was provoked by the complainants: in its overturning, the present appellants were the prevailing parties: why, then, should they be charged with the present expenditures (compare *Outtrin v. Graves*, 1 Barb. Chanc. 49; *White v. Meday*, 2 Ed's Chanc. 486; *Blassengame v. Boyd*, 178 Fed. 1). To summarize this special aspect of the

matter, it may be said that the awarding of costs in equity cases rests in the sound discretion of the court, but this does not mean that such discretion may be exercised arbitrarily or capriciously, or that the decision of the court will not be subject to revision on appeal. The statement simply means that the disposition of costs is not, as in cases at law, predetermined by fixed rules, but in every case the court will take into consideration all of the circumstances, and grant costs as justice seems to dictate: but in this connection, in the exercise of this discretion, it is held to be desirable to depart as little as possible from the rules of law on this subject, the principal one of which is that the prevailing party is entitled to costs, but not the defeated party.

In our opening brief herein, we made some observations concerning jurisdiction, in the course of which we contended that it was an essential ingredient in the conception of jurisdiction that the action of the lower court should accord with the established procedure governing the class in which the case in hand belonged: while we did not dispute that the lower court had authority in a proper case to appoint a receiver, yet we contended that no authority existed to appoint a receiver unless the proper case was presented to justify such appointment (compare *Maxwell v. McDaniels*, 184 Fed. 311; *Elliott v. Superior Court*, 168 Cal. 727): but if our views in this connection be sound, they naturally suggest a reference to the rule of "no jurisdiction, no costs" (*Citizens' Bank v. Cannon*, 164 U. S. 319), the decisions in support of this rule pro-

ceeding upon the ground that the court has no jurisdiction to award costs any more than it has to award any other relief, where the case is not legally before the court (*Pentlarge v. Kirby*, 20 Fed. 898).

Summarizing this branch of the matter we respectfully insist that the items allowable as costs or, to use appellees' reiterated but undefined phrase "taxable costs", may include fees of the regular and ordinary officers of court, charges for the service of papers, fees of jurors, trial fees, calendar fees, moneys expended for copies of papers, witness fees, affidavits, depositions, stenographers' fees, and matters of that kind; and even if we were to concede that this receivership actually did bring any fund into court, it would still be the settled rule that such a fund could not be charged with the payment of the fees of a special and limited court officer, like a receiver, or the fees of his counsel (*Hauenstein v. Lynham*, 100 U. S. 483, 491). On the other hand, the compensation of a receiver and his counsel is not treated as costs, or taxable costs, in any statute of the United States or of the State of California with which we are familiar, the subject of costs as regulated by Federal Statutes being found in 2 Fed. Stats. Ann. Second Ed., 624, *et seq.*, while the statutes of the State of California dealing with this subject matter will be found commencing with Section 1021, of the Code of Civil Procedure. Upon the whole, therefore, we insist with great respect that the items involved in this appeal are neither costs nor taxable costs, and that, if they are, they are not to be charged against the prevailing party upon the issue as to the receivership.

On pages 4 and 5 reference is made to the absence of criticism of the mere figures in the receiver's account it being conceded by the way that if objection had been made to the correctness of any of the receiver's items an appeal might lie from the order of the trial court; and it is claimed that "we are reduced to the question as to whether or not this is a taxation of costs". It seems then to be conceded that if the mere arithmetic of the matter were involved an appeal would be proper: but if the legal principles controlling that arithmetic be involved, an appeal would be improper: have we not here a pyramid standing upon its apex? And if it be assumed that the only question is one as to the taxation of costs why is it that the inquiry whether this is or is not a proceeding to tax costs has not been analyzed? *Butler v. Fairweather*, 91 Fed. 458, is then cited with reference to "the appealability of an order such as this": but so far as we are able to see, that authority is one which is really for these appellants and against the appellees. The case was decided on January 5, 1899: it was a contempt case growing out of the refusal of a witness to answer certain questions as to the contents of a codicil, on the ground that he was an attorney. The claim was made that the order committing the recalcitrant witness could be reviewed only on an appeal from the final decree in the cause in which the order was made: but it was held that this committing order proceeded "upon the matter distinct from the general subject of the litigation"; and so, likewise, in the matter at bar, we respectfully insist that this receivership was "a matter distinct from the

“general subject of the litigation”. The intimation on page 5 that the present appeal is an attempt to coerce the trial court to enter a certain kind of decree is, we think, an unreasonable statement, because there is never any improper coercion in compelling equitable action,—that is done in every equity suit in which a reversal is ordered. Nor is it at all material what may be appellees’ “belief” that there is no such final order in the instant suit from which an appeal lies (page 5, also): the finality of the order in the instant suit is not to be determined, we think, by anybody’s belief, but by the nature and character of the order itself. On page six it is stated that “as to who should ultimately pay “this expenditure was reserved for decision on entry “of the final decree”: but if this be so, it would seem that the real issue is one of liability and not of arithmetic, and that the principles establishing such liability should have been determined at the time, no good reason appearing why their decision should be delayed.

The appellees then proceed, on page 7, to discuss what they call the “real issues presented by this appeal”; and in opening that discussion seem to forecast the denial of their own motion to dismiss. They then declare in three separate sentences that the appellants’ opening brief fails to deal with the real issues presented by the appeal, and contend that if the appellants should prevail upon this appeal, this court would have to enter a decree, not only vacating the order of the lower court, but also requiring that court to exercise its discretion in respect to “*one element of the costs*” in a particular manner. We do not think, however,

The “Real
Issues.”

that this conclusion follows. We are unable to see why upon this appeal, which involves but "one element" of the case below, and that, too, a separate element with an identity of its own and quite apart from the general subject matter of the main case, the principles by which discretion should be governed cannot be laid down by this court; and certainly no adequate reason has been advanced by the appellees to support the contrary; and we think that while it is one thing to coerce the discretion of the lower court in a particular manner, it is quite another thing to state the general principles applicable to a topic, to the end that in dealing with such topic the lower court may be guided by those principles. In a word, we believe that the rules of law which determine ultimate liability for receivership expenditures, are essentially distinct from the arithmetic of the taxation of costs. What importance, then, is there in the suggestion of the appellees that the arithmetic of the receiver is uncriticised? We are not here concerned with his arithmetic, or chaffering as to whether he should have expended this amount or that amount for any particular purpose: but we are here to determine the question of ultimate liability for those expenditures, whatever their amount may be. These appellants consistently rebelled against submission to this expensively superfluous receivership: the directors of the company were compelled to submit to ouster from their authority, and to endure that expulsion until they finally recovered what was already justly their own: they see no reason why they should return thanks for being wronged, or why they should ask pardon

for being in the right: but when they appeal to the gross inequity of compelling this company to pay out of its own treasury for the wrong done it by an unauthorized invasion of its property rights by this receiver, the grotesque answer seems to be that it is not questioned that the receiver expended so many particular dollars and so many particular cents for this, that or the other piece of machinery.

The only possible sense in which the expression “concededly proper and reasonable allowances for receivership compensation and costs”, at the top of page 10 of the appellees’ brief, can be considered, is that the receiver in purchasing or repairing this, that or the other mining machinery did not expend for that purpose an unreasonable amount: but to say that those allowances were conceded to be proper to be taken out of the treasury of this company is to say something which has never been conceded by the appellants throughout the length and breadth of this case. Nor do we understand the propriety of the claim that a receiver should not be required to undergo the delay or risk incident to an order requiring him to look for compensation and expenses to the party at whose instigation he was appointed: the authorities dealing with receivers very generally show that orders of this kind are made with great frequency in receivership cases: as we have already hinted in our opening brief, no obligation rests upon any particular person to undertake a receivership, but if one does undertake the task, he does it knowingly and in view of the settled doctrines of the law governing such an activity; and, again,

we say, that we are wholly unable to perceive either the equity or the ethics of my putting my hand into your pocket to compel you to pay me for a wrong which I have done you. Nor do we perceive the propriety of the additional suggestion on page 10 of delaying the determination of matters incident to a receivership itself terminated, until the signing of the final decree in the main case: we have already adverted to this topic: we see no good reason why two bites should be made of this cherry; and we have looked in vain for any respectable authority which justifies piecemeal dealing in a matter of this kind,—or indeed in any other matter wherein for the peace and best interests of society an end should be put to litigation already interminable. In the nature of things, the receivership itself being a terminated episode, no good reason can be advanced why matters connected therewith should not themselves promptly be terminated. There is here no such “piecemeal taxation of costs” as is intimated on page 11 of this brief: the general costs of the litigation at large, are one thing, but the principles by which we are to determine liability for the expenditures of a terminated phase of the litigation, are quite another thing, altogether; and here, again, we encounter the familiar fallacy which obscures the general costs of the main litigation upon the one side, with the ultimate liability for expenditures of a closed phase, upon the other. When it is said on page 11 that this appeal should be determined in the light of the “very simple “ and well established principle” of the initial discretion in respect to the taxation of costs which is vested

in the trial court, what taxation of costs is referred to? Do the appellants mean the costs of the main case, or the expenditures of an independent and terminated branch—an episode and “side issue” (*Hovey v. McDonald*, 109 U. S. 150), not necessary to the main case, and without which the main case could just as well have proceeded, and actually did proceed, to a decision? And why assume that we wish this court to tax costs? We are asking this court to do what the lower court should have done, viz., formulate the principles by which ultimate liability for the expenditures of this unnecessary receivership should be determined. And could any thing be more unreasonable than the constant repetition of the “first instance” fallacy? We are not here dealing with any “first instance” function: the receivership was terminated: after having been persistently resisted from the beginning, it received its quietus at the hands of this court with certiorari denied by the highest court of all; and thus, upon every principle which makes for the termination of litigation, what we are seeking to have determined is the principle according to which ultimate liability for the receivership expenditures shall be fixed. We are not dealing with what is called on page 12 of appellees’ brief, a “purely temporary provision for his (the receiver’s) ‘compensation and expenses’”: we are not looking forward to any continuance of this receivership such as would be implied by the thought of a “temporary ‘provision’”: what we are here dealing with is the end of the receivership and the business incident to that, and the real liability for the expense of its administration.

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Toward the lower part of page 12, we notice a reference to the alleged benefit resulting to the company from the receivership,—a claim which has not been without repetition by the appellees, but as to which our views have already been briefly stated in our opening brief. We have never disputed the physical fact that during the period of time embraced by the receivership a considerable amount of money came in to the company's treasury, but we have always insisted that no evidence is producible to establish that any profit was in any degree attributable to the receivership, and that the evidence was to the contrary. This topic has been considerably discussed throughout the prior history of this case in this court, and it does not, therefore, seem necessary in this place to do more than to add that during the year 1915, which was the last year of the appellants' management of which there is any evidence in the record, the price of silver was well under fifty cents per ounce (Trans. No. 3253, pages 714-6); that the selling price of silver during the year 1918, from month to month is set forth on page 214 of the present record, that being the only occasion upon which the receiver states the fact in plain figures; and that on April 23, 1918 (Fed. Stats. Ann., 1918 Supplement), about 60 days after the receiver was appointed, the Pittman Act passed the Congress and fixed the price of silver at \$1.00 per ounce. It was and is common knowledge that during the years 1918-1920, there was a phenomenally high price for the commodity which the company produced for sale; and it is not an unreasonable statement to make, based upon all of the dis-

closures touching this subject matter, that the increase in the company's cash during the years 1918-1920, is to be attributed to the rise of this selling price and not to any other cause whatsoever; and that the cash resources of the company increased, not because of this receivership, but in spite of it.

At the bottom of page 14 of the brief under consideration, a quotation is made from 23 R. C. L., page 106, substantially to the effect that in fixing the ultimate liability for receivership expenses, courts will be governed by an equitable discretion: but on page 23 of the same brief, it is submitted that because the court deferred all questions as to the "taxation of costs" until entry of the final decree, therefore all consideration of the matter of superior equities, as bearing upon the question of "taxation of costs", "become purely academic and moot"; but we do not understand why, if the ambiguous phrase "taxation of costs" be synonymous with the determination of the real liability for the expense of an opposed and discarded receivership, the consideration of the matter of equities should be purely academic and moot. We think, as we have already suggested, that the expression "taxation of costs" has a well defined legal meaning, which does not include within its scope the ascertainment and application of the principles whereby a liability for the expense of a rejected receivership should be measured, nor do we believe that in the familiar process of taxing costs equitable discretion has any play, the court in such a matter being constrained by the provisions of the relevant statute which as we have seen must be strictly

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construed. On the other hand, when we are seeking to determine upon whom should rest the liability for the expense and loss occasioned by an unnecessary, improper and finally rejected receivership, equitable discretion, and the consideration of superior equities, and especially adjudged superior equities, furnish the test whereby that liability is to be determined; and this appears to be the view of at least one of the present solicitors for the appellees, as may be attested by the following passage excerpted from a brief filed by him in this matter in the lower court:

“Upon careful consideration, under the principles of law applicable to federal equity suits, we believe we are sustained in our position that in Federal Courts the appointment of receivers is within the sound discretion of the Court; that if jurisdiction of the parties and subject matter is obtained, *and the facts warrant the appointment of a receiver at the time of the appointment*, the receivership costs and expenses incurred by him as an officer of the Court should be paid out of the fund or property in his hands; that the Court likewise has large discretion in determining who shall pay the costs out of the receivership, and according to the justice and equity of each case it may assess the costs of the receivership against the fund, against the applicant, or against the parties”;

citing authorities which have reappeared in the brief filed in this court.

In other words, the quotation from 23 R. C. L. 106, at the bottom of page 14 of the appellees brief is not only at war with the attitude exhibited on page 23 thereof, but it is really a concession that something more is here involved than a mere arithmetical computation: that quotation, as echoed in the brief in the court below just quoted from, concedes that the relevant

equitable principles are to be ascertained and applied; but to say that in this judicial process the equities of the parties "become purely academic and moot", is not only to exhibit an amazing deficiency in legal vision, but it is a very thorough-paced volte-face from the position taken below as exhibited in the passage just quoted. And in this connection, while on this topic, after telling us on page 23 as to what these appellees are "disposed" to do, we are then on page 29 advised that the doing of what they were "disposed" to do is "altogether superfluous". If "altogether superfluous", why then dignify it even by an abortive, quite inadequate and wholly unconvincing attempt at the dissection of the "unthinkable" (p. 23)? And just here, note the "unthinkable" distinction attempted at pages 28-9: the order appealed from quite distinctly conveys to the mind a very vivid conception of how the "receivership costs" were "temporarily (whatever that may mean) provided for out of the fund": if this order does not mean that the moneys therein mentioned are not to be taken from the company and handed over to the dethroned receiver, then for us at least plain English speech has ceased to retain intelligent meaning. But note, too, that these moneys are now, at last, spoken of as "receivership costs" (page 28),—an admission incapable of reconciliation with the general pose of our opponents. No successful contention can, we believe, be made that the order appealed from did not terminate the receivership and end that phase of the case in the lower court; the receivership was wound up; no judicial power or discretion, equitable or otherwise, remained

which could operate on the receiver, because if there were, the receivership would not have been terminated, the receiver would not have been discharged, his sureties would not have been exonerated; and therefore so far as this receivership is concerned, the order appealed from has in all its parts the quality of finality. Thus are met even the most extreme assertions of the appellees; and in cases of this class, no question has ever been made as to the right to complain by appeal. See, *inter alia*:

In re Michigan Ry., 124 Fed. 727;

Kell v. Trenchard, 146 Id. 245;

Corn. Co. v. Chicago Co., 185 Id. 63; .

Snyder v. McCarthy, 197 Id. 166;

Motion Picture Co. v. Steiner, 201 Id. 63.

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cy.

While discussing what appellees claim to be "false issues", and after pointing out that we have objected to the jurisdiction, it is then observed that "it is next" "inconsistently asserted that even if the court had jurisdiction to make the order, a recognition of the superior equities would require the taxation of receivership costs against complainants": but where is the "inconsistency" here? Has it, for example, ever been adjudged that because I deny that I have been guilty of negligence, I may not also defend upon the further ground that, *even if I were*, the plaintiff's contributory negligence precludes any recovery by him? This is but a simple illustration of a fair and recognized method of argumentation in daily use, examples of which may be found in various forms and in various branches of the law in adjudged cases whose name is

legion (*cf. Todd Co. v. New Era Co.*, 236 Fed. 768; *Am. Nat. Bk. v. Donnellan*, 170 Cal. 9). And strange to say, in the very brief in which this imputation of "inconsistency" is made, we find a corresponding "inconsistency" of which these appellees themselves have been guilty: they claim that this appeal should be dismissed, because not an appealable judgment, and because prematurely taken, and yet they "inconsistently" assert that even if the appeal was properly taken, still a recognition by this court of what appellees consider to be sound legal principles would require the affirmance of the order appealed from; and in view of this attitude on the part of these appellees, we think that this accusation of "inconsistency" may be dismissed from further consideration.

On page 17, the appellees are constrained to admit a distinction between the exercise of discretion as to the taxation of receivership costs, and the exercise of discretion generally in the case: why this distinction? Have we not here an unwitting admission of the separability of this entire receivership episode? Is there not here a concession of what we have hitherto contended for, viz.: the independent identity of the receivership and its standing apart from the case generally?

Separability of Receivership.

Some observations are then made by the appellees with reference to the subject matter of jurisdiction, but beyond citing the Arredondo case from the memorandum opinion of the learned judge below, no reference is made to any well considered case, except that indirectly a passing reference is made to the Wear case on page 21. The definition of jurisdiction as the "power to hear

Jurisdiction.

“and determine” sins by omission, and the Arredondo case itself confirms this criticism. According to the quotation on page 17 of appellees’ brief, a case is *coram judice* only “whenever a case is presented which brings this power into action”, and it is added that if a petitioner “states such a case” as would be impervious to demurrer, “it is an undoubted case of jurisdiction”: but who disputes that? Our insistence has always been that, quoad this receivership, no “case is presented “which brings this power into action”; and we have always claimed that the complainants in the original suit did not “state such a case” as would create, quoad this receivership, “an undoubted case of jurisdiction”. On page 18 it is asserted that

“the cases cited by appellants in support of this contention where they are at all pertinent relate to situations where jurisdiction is limited by statute, or by the presence or absence of certain jurisdictional facts”;

but we rise to inquire what is meant by the enigmatic phrase “the presence or absence of certain jurisdictional facts”; and we respectfully insist that we should very much have preferred a critical analysis of the cases cited by us to the bald generality just quoted. If “the presence or absence of certain jurisdictional “facts” mean, to employ the language of the Arredondo case, the presentation of a case which brings the power to hear and determine into action, how does this suggestion by the appellees advance the correct resolution of the cause at bar? The assertion on page 18 that

“general jurisdiction necessarily includes the power to do anything and everything that equity and good conscience require”,

is flatly contradicted by the entire current of respectable authority upon this topic, many illustrations of which will be found on pages 27-29 of our opening brief. In one of those cases (*Reynolds v. Stockton*, 140 U. S. 254) the Supreme Court quoted with approval from a New Jersey case, to this effect:

“It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises”.

But without further developing this matter, we decline to concede that general jurisdiction includes the power to do anything and everything which, in the opinion of a chancellor, equity and good conscience may require: modern conditions no longer justify the sarcastic criticism of Selden to the effect that the chancellor's foot was the standard of measure, and that “one chancellor has a long foot, another a short foot and a third an indifferent foot”; and as remarked by the Circuit Court of Appeals for the Eighth Circuit:

“In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development, equity jurisprudence has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable”.

MacElroy v. Masterson, 156 Fed. 36-42.

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And on this page 18, the distinction between an equity suit proper, upon the one side, and the appointment of a receiver, upon the other,—a distinction for which we have always contended,—seems to be recognized. It is there said that,

"the appointment of a receiver was not the subject matter of the suit. Indeed such a remedy is never primarily the subject matter of a suit but is always ancillary to the subject matter",—

in other words, to use a phrase from *Hovey v. McDonald*, 109 U. S. 150, a receivership is a "side issue" in an equity suit, and a side issue which may or may not make its appearance, and a side issue without which the main suit may readily progress to a final decree upon its own merits.

jurisdiction
gain.

And while we think that this admission disposes of all criticism as to the appealability of this order, and as to this appeal having been prematurely taken, we decline to concede the soundness of the next observation of the appellees, in substance to the effect that where a court has jurisdiction of the "case generally", it follows that it would have jurisdiction over the purely ancillary matter of the appointment of a receiver: this, we dispute; and as pointed out in our opening brief (pages 22-33), it is quite readily conceivable that while a court might have jurisdiction of "the case generally", yet it would have no jurisdiction of the purely ancillary matter of the appointment of a receiver,—such a situation is readily conceivable according to the law of the domicile of the corporation involved in the cause at bar (*Elliott*

v. Superior Court, 168 Cal. 727). On page 19 it is stated that

“the contention of appellants that the jurisdiction to appoint a receiver is present only in a case where under the showing made a receiver should be appointed, necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him must be said to have exceeded its jurisdiction”.

In reply to this it may be said that the contention of appellees that jurisdiction to appoint a receiver is present in a case where under the showing made a receiver should not be appointed necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him cannot be said to have exceeded its jurisdiction; and to the ridiculous conclusion that the court in the Arrendondo case was grossly in error when it held that a case was *coram judice* “whenever a case is presented which brings this power “into action”; and to the ridiculous conclusion that in the Elliott case, *supra*, for another example, the Supreme Court of California was grossly in error in holding that although the Superior Court had jurisdiction of an ordinary action at law brought by a private individual against a corporation for goods sold and delivered, yet that same court was quite without jurisdiction to appoint a receiver of the entire assets of the defendant corporation; and to the ridiculous conclusion that any court can make jurisdiction for itself by the appointment of a receiver in a case in which, under the principles and rules of equity, no authority existed for such an appointment.

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Silence.

We cannot appreciate the significance of the inferior and third-rate suggestion that the lack of jurisdiction of the lower court to appoint a receiver is in the slightest degree affected, or could be affected by the alleged raising of that question for the first time upon this present appeal. Jurisdiction is neither created nor destroyed, nor qualified nor affected, by any lapse of a party litigant; it does not take its origin from any such source; a court of the United States has such jurisdiction only, original or appellate, as is conferred on it by Congress, within the constitutional limits (*U. S. v. Mar Yin Yuen*, 123 Fed. 159):

“That this court is one of limited jurisdiction need only be stated, without argument, and without citation from any of almost innumerable authorities; and it can be said with like emphasis that in doubtful cases the doubt is to be solved against jurisdiction being entertained”

(*White Swan Mines Co. v. Balliett*, 134 Fed. 1004); and in a suit in the federal courts, the question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion, or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction (*Kreider v. Cole*, 149 Fed. 647).

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isdiction.

Nor do we understand the suggestion that if the order appointing the receiver were void, the lower court would have no discretion to exercise with respect to the administration expenses, because its custody of the property through the receiver was without right; why, indeed, should not a court under such circumstances deal with such administration expenses?

Assume the order appointing the receiver to have been void, and assume that by reason thereof the receivership is terminated to the extent of surrendering the property in the possession of the receiver to the parties held entitled thereto; why should this prevent the court from determining the ultimate liability for those administration expenses, and in the light of that determination dealing with the consequent arithmetic? Our opponents cite no authority to sustain this claim; but Mr. Justice Brewer could find no difficulty in recognizing that jurisdiction does not necessarily cease when a receivership is terminated to the extent of surrendering the property in the possession of the receiver, because

“it is a common practise in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate” (*Bosworth v. Terminal Association*, 174 U. S. 182, 189-190).

On page 20, it is suggested that the appointment of a receiver might be void for lack of jurisdiction by reason of statutory restrictions; but no such statutory restriction is claimed in the instant case, nor could it be claimed in view of the provisions of section 564 of the Code of Civil Procedure; but statutory restrictions are not the only restrictions; and we submit that no jurisdiction exists in any court whereby that court is authorized, through a receiver, to take charge of the business and property of a corporation before dis-

Statutory
Restrictions.

solution and while it was a going concern, oust its officers and terminate its activity, in a suit prosecuted by a private party. It is true that the receiver was not appointed in the instant case until the hearing upon the merits had been concluded, which is but another way of saying that this receiver was not appointed until the learned trial judge had before him precisely the same materials from which the appellate court made up its decree discharging the receiver. The suggestion is made that this whole matter was not free from doubt, because of the dissenting opinion of one member of this court, who concurred, so our opponents say, with the judgment of the lower court as to the propriety of the appointment of a receiver under the showing made; but a careful examination of that dissenting opinion fails to disclose, not only the slightest reference in terms to the receivership, but also any deliberate or reasoned suggestion speaking to the point of the propriety of the appointment of a receiver under the showing made; and when we consider that this dissenting opinion was laid before the Supreme Court of the United States, upon the application for a writ of certiorari, but that writ was denied, we can draw no further inference than that this dissenting opinion was without weight or influence with the court of ultimate decision in this country.

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missions.

It is then suggested that upon the former appeal the appellants admitted and conceded the jurisdiction of the lower court to appoint the receiver; but whether this assertion be true or not true we do not now stop to inquire, because as is plain from the authorities

heretofore cited, jurisdiction cannot arise by consent, or by failure to object, or by any admission or concession of a party litigant; and it seems to us that the attitude of a litigant is quite obviously insecure when he resorts to a line of argument of this type. The case of *St. Louis Ry. v. Wear*, cited at the top of page 21 of appellees' brief, was selected from a table of cases cited by us on page 29 of our opening brief, where it was referred to as supporting the proposition that in order that jurisdiction should exist in any tribunal in any matter, there must be not only the abstract power to hear and determine, but also the concrete power to hear and determine the particular case, and render the particular judgment in that particular case, within the issues of that particular case, and in accordance with the established procedure governing that particular case; and we were there not dealing with the writ of prohibition, a remedy as to which different states adopt different policies. Thus, in a Californian case it is laid down that where an order fixing the compensation of a receiver directs it to be paid out of the fund in the receiver's hands, as was the case here (*Trans.* 3896, pp. 505-6), such order will be a final judgment and appealable by any party interested in the fund, and there being a remedy by appeal or certiorari, a writ of prohibition will not lie to arrest the proceedings in the Superior Court (*Grant v. Superior Court*, 106 Cal. 324; and see, also, *Fisher v. Superior Court*, 110 Id. 129; *Murray v. Superior Court*, 129 Id. 628; *Jacobs v. Superior Court*, 133 Id. 364).

Prohibition.

It is then suggested that if excess of jurisdiction is to be urged, good faith would have required a resort to the remedy of prohibition to prevent the accrual of receivership expenses and the further damaging results complained of; but if there be one feature of this litigation against which these appellants have strenuously objected throughout, it was the appointment of this receiver; and how any person reading this whole record with an open mind can doubt for an instant the good faith of that opposition, we are simply unable to understand. According to the law of the domicile of this corporation, prohibition was not an appropriate remedy; and if the fact,—if it be a fact at all, which we dispute,—that the jurisdiction to appoint this receiver was unchallenged upon the former appeal, should suggest that the present contention is an afterthought, that suggestion is answered not only by the unremitting antagonism by these appellants to this receivership during the hearing below and in the briefs upon the former appeal, but also by the suggestions which we have made, and supported by reference to well considered federal decisions, that no jurisdiction is possible, in a federal court, to be conferred by inaction, waiver or consent. While it is true that during the hearing of the main case the burden of the complainant's song was the fraud of William S. Noyes, while it is true that his case rested upon that asserted fraud, and while it is true that upon the former appeal the principal attention of these appellants was directed to the refutation of that abominable imputation, yet it is not true, as the record there will demonstrate, that the appointment of this receiver was "unchallenged".

The next section of appellees' brief, included between pages 21 and 30 thereof is entitled: "Superior Equities"; and in effect it is a contention that in the taxation of receivership costs,—a matter obviously resting in a discretion purely equitable,—a consideration of superior equities would be inadmissible. Much that is said in this portion of the appellees' brief has already been commented upon, more or less, in connection with what we have hitherto said; and we shall not repeat in this place any of those observations. Bearing in mind the remarks made on pages 21, 22 and 23 of this portion of the brief we can only repeat that a receivership is not an indispensable feature of every equity suit; it is a thing apart from the main body of the litigation; as in the cause at bar an equity suit may readily proceed to a decision upon the merits without any receivership whatever; it has its own origin, its own existence, its own termination; and decrees of courts winding it up and terminating its affairs have, as we have already seen, the quality of finality and of appealability. But if this be so, why should not, upon the termination and final closure of a receivership, its associated business be likewise terminated and closed up? What principle of law justifies the closure of a receivership while leaving matters of moment connected with it quite undisposed of? Why compel these appellants, in a matter which has already reached its own definite conclusion, to await a final decree, when the entire immediate subject matter can be expeditiously disposed of upon the present hearing? Is it any answer to this position to say baldly that the time-saving result sought by these

"Superior
Equities."

appellants "was not done"? And if it be legitimate upon the closure of a receivership to wind up its associated business as well as itself, why should not the disposition of those associated matters, in so far as they rest in equitable discretion, be themselves disposed of in the light of the superior equities, and especially the adjudged superior equities, of the parties? Could any fairer standard of decision be imagined than this?

Why Ignore
the Prior
Decisions in
this Cause?

On pages 20, 23 and 24, many things are said which leave the impression that the writer of this brief is unfamiliar with the prior decisions of this court upon the main case and the refusal of the Supreme Court of the United States to review the disposition of the case there made. For example it is said on page 23, that two minority stockholders, because of the dominance and control of corporate affairs by the majority were compelled for the protection of their own interests and the interests of other minority stockholders and of the corporation, to commence this action for the purpose of recovering from some of the majority stockholders valuable property rights; is this statement, put in just this way, with all of its assumptions and implications, sustained by the record? Did two of the minority stockholders act as is here intimated? What act, we ask, does the record disclose as having been actually performed by Martin for the purpose stated? When did he ever visit the mine? What testimony did he ever give? What deposition did he ever make? What letter did he ever write dealing with Company affairs? On what particular day during the trial was

he ever present in court? What particular document, pleading or otherwise, visible in this record, did he ever sign? What was the nature, character and extent of any actual visible participation by him in this controversy? While it is true that:

“You may turn, you may twist, this case as you will,
The clamor of Overton rings through it still”,

while it is true that Overton, spurred by his desire to “control the management” of this enterprise, was ubiquitous throughout this litigation, yet who constituted the “two of the minority stockholders”?

It is then said that these mysterious “two of the “minority stockholders” were compelled by reason of the domination and control of corporate affairs by the majority to begin this action; the implication here is not only unwarranted in itself and contradicted by the record, but is in flat antagonism to the views expressed, not only by Judge Dooling, but also by this court. If it were not sought by this statement to suggest an implication unfavorable to the present appellants, this statement, especially when we look back over the past history of this litigation, would be without purpose or meaning; and assuming, then, that the intention which inspired it was one inimical to these appellants, we take the liberty of quoting in this place the following brief excerpt from the original opinion of this court in this cause:

“In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders, and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders. . . .

Upon the face of the record and in view of all the evidence, we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration”.

The “valuable property rights” referred to in this portion of the appellees’ brief had reference, without doubt, to the piece of land known as Section 5; and it is stated by the appellees at the place cited that “as a result to their activities in that behalf”, there was an “enforced conveyance of Section 5”: but these statements we flatly deny. If there was one feature of this case which was prominent, a feature unfortunately not referred to in the dissenting opinion handed down for the first time after the rehearing,—it was the continued willingness of Mr. Noyes, expressed in writing, orally, and in reports to the stockholders, to transfer Section 5 to the company upon payment to him of its purchase price and incidental moneys,—an attitude recognized even in the original interlocutory decree which was the subject of contention upon the original appeal. A conveyance of Section 5 by Mr. Noyes was therefore not “an enforced conveyance”: on the contrary as pointed out in the opinion on rehearing announced January 17, 1921:

“Noyes admits he purchased the title of Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to convey.

He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent''.

We deny that

"the three years of receivership administration of the properties of the defendant corporation resulted in the accumulation over and above all expenses of operation, taxes, receivership costs, of upwards of a half a million dollars'';

this suggestion we have answered elsewhere; and we do not conceive it necessary to repeat that reply in this place.

Between pages 25 and 27, the debilitated fallacy based upon the language employed in the complainant's amended bill below and the defendants answer thereto, is renewed; and we devote a few lines to the consideration thereof bearing in mind that

The Pleadings in the Main Case.

"a defendant has no right to anticipate or undertake to control by his pleadings the nature or character of the proof upon which his adversary may think proper to rely in support of his cause of action, nor to ground his defense upon any such proofs. *He must deal with the facts as they are set forth in the declaration*; and not with the supposed or presumed evidence of them'' (*U. S. v. Girault*, 52 U. S. (11 How.) 22, 29-30).

The amended bill of complaint was filed below on September 25, 1915. In paragraph VII thereof (Trans. 3253 p. 43) it alleged that since the middle of December, 1912, Mr. William S. Noyes was the owner of Section 5, and that since May 26, 1913, he was the record owner thereof continuously until the filing of this amended bill; and then, after having thus admitted Mr. Noyes' ownership, and after having proceeded with certain

allegations of alleged fraud, this amended bill in paragraph XVI claimed that the mining company, since December, 1912, was the equitable owner and entitled to the possession of Section 5 of which, it was claimed, Mr. Noyes was a trustee. These same allegations had been in substance contained in the original bill of the complainants; but concerning that original bill, Judge Dooling observed,

“The bill here does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company. Nor does it show that the lease between said defendants is not a profitable one for the mining company. Nor does it show that defendant Noyes is not the owner of the leased property, or that the defendant company has any legal or equitable interest therein”.

When the defendants below came to answer this amended bill, they admitted that since about the middle of December, 1912, Mr. Noyes was the owner of Section 5, and that he was the record owner thereof continuously since May 26, 1913; but they alleged that he was such owner only in the sense and by reason of the fact that during said time he was the owner of substantially all or all of the capital stock of the Silver Hill Mill and Mining Company, the then record owner of said Section 5 (Trans. 3253, p. 95); and answering the claims of the amended bill concerning the equitable ownership of Section 5, the defendants, following the language of the bill, denied that the Presidio Mining Company was the equitable owner or entitled to the possession of Section 5, and denied that Mr. Noyes was the trustee of Section 5 for the Presidio Mining Company or any other person; and then, in paragraph

22 of said answer, beginning at page 137 of the transcript in No. 3253, the defendants went on with a very full statement of the history of Section 5 and the relations of Mr. Noyes with reference thereto. On the hearing testimony supporting these allegations was given. Thereafter, in disposing of this matter, this court, recurring to the views of Judge Dooling, remarked:

“The third ground of failure of the original bill to state a case for equitable relief was that it did not show that Noyes was not the owner of Section 5. That question has already been disposed of by the finding of the interlocutory decree and the proof that Noyes is and has been the owner of Section 5 since May 26, 1913. . . .

The object of this suit is to establish a constructive trust in Noyes for the ownership of Section 5 for the benefit of the Presidio Mining Company. The Court below in its interlocutory decree found that Noyes purchased Section 5 with his own money. We concur in that finding, to which we add a finding that the purchase was made after the Presidio Mining Company had refused to make the purchase because of its financial inability as recited in the lease of November 19, 1913. But the plaintiffs charge Noyes with having acted in a fiduciary capacity in the purchase because of his relation to the company as an officer and director and that his action was fraudulent. It is further charged that he obtained the title in his own name through fraud, misrepresentation and concealment and that this fraud and concealment was participated in by the other officers and directors of the company and its majority stockholders. These allegations are denied by the defendants under oath. . . .

In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of Wm. S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant sinister power or influence over the Board of Directors or any of the stockholders. The lease of January 25, 1913, was adopted by the Board of Directors

of the company at a meeting of the board held on January 29, 1913. Wm. S. Noyes was not present at the meeting. He was elected a director at a meeting of the board held on January 31, 1913. On that date he was in Texas and had been there since shortly after the middle of December, 1912, and he remained there until February 5th or 10th, 1913. He was present when the so-called 'bonus resolution' was passed on February 15, 1913, but he took no part in the proceedings. He was not present when the lease of November 19, 1913, was approved and signed. *Upon the face of the record and in view of all the evidence we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration. . . .*

It is clear from this evidence that Noyes purchased Section 5 with his own money but for the benefit of the Presidio Mining Company; that he has always been ready to convey it to the company upon the payment to him of its purchase price and as late as February 28, 1916, in his last report to the stockholders, he declared in effect that he held the title for that purpose and no other."

And in the opinion on rehearing, this court added:

"The plaintiffs claim that this decree raises a constructive trust wherein Wm. S. Noyes, while holding a fiduciary relation to the Presidio Mining Company, acquired the title to Section 5, but this is not sufficient to entitle the plaintiffs to a decree which carries with it the judicial declaration of a fraudulent acquisition of the title by Noyes and that he has refused and still refuses to convey the title to Section 5 to the Presidio Mining Company upon the payment of the purchase price. Noyes admits that he purchased the title to Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase, to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to

convey. He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent. What then remains for equity? It may decree specific performance, a remedy within the discretion of the court''.

We think that fair consideration of the foregoing, together with the fair inferences of fact deducible therefrom, and together with the application thereto of familiar principles of law, will sufficiently exhibit the futility of appellees' suggestions in this connection.

On pages 27-30, many things are said by the appellees which are fully met in the opinions of this court heretofore delivered in this controversy: the whole Osborn history, for example, was fully considered in the original case, and cannot, upon familiar grounds be reopened at this time; and as to any compulsion of the corporation, against its own interests, to deny any right to section 5, because of the majority control held by individual appellants, we feel that we are entitled to rest upon the views of Judge Dooling, upon the views of Judge Van Fleet, who recognized in his interlocutory decree the rights of Mr. Noyes, and the views of this court recognizing that Section 5 was actually purchased by Mr. Noyes, with his own funds, and recognizing, too, his perfect willingness at any time to convey the same to the company upon payment of the purchase price and incidental moneys,—from the beginning of this business to the end of it, William S. Noyes has never resisted the transfer of Section 5, but he *did* resist, and with success, complainant's unfounded accusation of fraud.

Prior Decisions in this Cause Further Ignored.

We do not understand what is meant by the expression, used with reference to "receivership costs" at the bottom of page 28 and the top of page 29, "only temporarily provided for out of the funds". The idea seems to be that the order appealed from did not tax "receivership costs" at all, as we think the court should have done, but only temporarily provided for them out of the fund: but we think that whatever form of words may be used, the loss to the corporation by compelling it to pay for the wrong which has been done to it, whether that payment be "temporarily provided for", or otherwise, would be precisely the same. But when a receivership comes to an end, is finally closed, the receiver discharged, his sureties exonerated, and that chapter of the history terminated, what is meant by such an expression as "temporarily provided for out of the fund"? Was the receivership terminated or not terminated? When we speak of temporary provision, we have in mind something quite different from final provision; and we are quite unable to grasp the idea that it is possible for the same thing to be and not to be at one and the same time. It is plain, however, that if this appeal had not been taken within the time allowed by law, what was "only temporarily provided for out of the fund" would now be "permanently provided for out of the fund", at least as far as the receiver is concerned. Can the trial court first "temporarily provide" and then "permanently provide" by simple inaction in failing to enter a final decree generally? And no final decree has yet been entered by the trial court in this cause.

Another misleading ambiguity in this portion of the appellees' brief is to be found in the suggestion that these appellants "consented" to the diversion of corporate moneys to the payment of the expenses of a receivership which with unbroken antagonism they have steadily resisted from the beginning; we believe that the mere statement of this matter is sufficient to show that while these appellants may have made no question concerning the regularity of the receiver's arithmetic, they never once consented to any payment in the sense that such consent involved any recognition of the receivership or of its attendant expense. In passing from this section of the appellees' brief, we frankly confess our inability to appreciate the doctrine of constructive assent to jurisdiction whether as applied to the master's allowance or otherwise, and in this connection we refer to the objection formulated on pages 368 to 370 of the present record.

Appellants'
"Consent".

In view of what is said on pages 30-32, of the brief under consideration relative to the taxation of receivership costs upon the coming in of the final report of the receiver, we are compelled to repeat that in view of the nature of a receivership, its ancillary character, and its separability from the main litigation, we can perceive no good reason why when that independent phase is itself terminated, its associated business, affairs and interests should not likewise be terminated if it ever be to the interest of the Republic that an end should be put at any time to litigation. We know of no sufficient reason why this should not have been done: we know of no sufficient reason why the principles governing this mat-

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ter cannot be determined upon the present appeal in such a decree as, taking into consideration the whole situation, shall be conformable to equity and good conscience in the premises; and we think it no answer whatever to this position to assert to us that the lower court did not do this thing, without accompanying that assertion by some logical reason to sustain it. On this appeal, we are not concerned with the taxation of costs generally, or the costs in the main case: we are concerned solely with the expenses connected with a wholly unnecessary and rejected receivership which has finally come to its end.

In that portion of the brief described as the "conclusion" from page 32 to the end, we find a number of statements made which at this time we do not stop to criticise for the reason that they are all considered and disposed of in the former opinions of this court and in the ruling of the Supreme Court on the application for certiorari; and in so far as any assertion there contained has to do with any subject matter not fully considered and disposed of by these prior opinions, such matters have, we think, been sufficiently fully considered in the criticisms heretofore presented. It would be a waste of the time and patience of this court to go again over matters so fully considered in the briefs and opinions heretofore filed in this cause.

In the "argument on behalf of the receiver", we note the unfair statement on page 2, to the effect that the stipulation agreeing upon Mr. Maling as the receiver was subject to the reservation by the defendants that it should not be construed to qualify their appeal from

the order, the word "appeal" being underscored,—as if this were a full and correct statement of the attitude of the present appellants with reference to the appointment of a receiver. It will be remembered that in the oral opinion of the learned trial court, after recognizing that the appointment of a receiver is "separate and distinct" from the reference of the case to a master for the purpose of taking an accounting, the learned trial judge went on to say that the circumstances were such as to "authorize" the appointment of a receiver for this property (Trans. 3235, p. 423) following which, came the interlocutory decree, which was originally appealed from. The appointment of a receiver being thus inevitable, the stipulation printed on page 436 of the original record was entered into; and we submit that while this stipulation *guarded* the appeal from the order appointing the receiver, still its plain purpose and intent was entirely in line with the objections and exceptions of the defendants consistently presented in opposition to the receiver, which objections and exceptions are recited as among, "the premises considered, understood and agreed to". If the stipulation were intended to guard only the appeal from the order of appointment, why should the defendants have scrupulously inserted therein the recital, "whereas, in the above entitled matter, against the objections and exceptions of the above named defendants, said court is about to give and make its order that a receiver be appointed herein"?

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Complaint is made on the same page to the effect that the appellants did not move to have the receiver return the property until the mandate of this court was presented on May 6, 1921. Is there no explanation for this alleged detail which is known to the receiver or his solicitor? Did the receiver or his solicitor know that by the decree of this court of October 27, 1919, the receiver was actually discharged? Did they know that following upon that decision, and on November 17, 1919, application was made to this court for a diminution of the record which was disposed of on January 5, 1920, only to be followed on January 26, 1920, by a petition for rehearing which was subsequently granted and heard on May 21, 1920, and decided on January 17, 1921? And again, were the receiver and his counsel unfamiliar with the petition for a writ of certiorari immediately addressed to the Supreme Court of the United States and by that court denied on April 25, 1921, only eleven days prior to the presentation of the mandate on May 6, 1921, referred to on page 2 of the receiver's argument? These facts explain, and we venture to think sufficiently, why

"appellants made no move to have the receiver return the property until their motion made when they presented the mandate of this court on May 6, 1921";

but since these facts must have been known to the receiver and to his solicitor when he wrote this argument, we are unable to understand why as a matter of common fairness to the court and their opponents, no reference was made to these explanatory facts.

On page 3, the suggestion is made that the objections of the present appellants to the appointment of a receiver were

Appellants' Opposition to Receivership not "Serious".

“seemingly more for the purpose of preserving a record than as a serious opposition to the possession of the receiver”;

but we ask looking back over the history of this litigation, and the constant and unremitting antagonism of these appellants to the invasion of the property of the company by the receiver, what opposition could have been more serious? So far as permitting the receiver to “remain in possession until the final determination “of the appeal” is concerned, we point to the history intervening between the making of the interlocutory decree originally appealed from and the order of the Supreme Court of the United States denying certiorari, to explain, not why the receiver was permitted to remain in possession, but why he was not more promptly removed. The statement on the same page that “this “court deemed it equitable that complainants should “have substantial relief”, seems to call for no other criticism than that upon every serious feature of the case, the lower court was reversed, as we have pointed out in our opening brief herein, and that the only “substantial relief” accorded was the outgrowth and product of the willingness of Mr. Noyes to convey Section 5, which he had bought with his own money, to this company, and the judicial approval of his attitude with regard to that section.

complete
reference to
the Case.

At the top of page 4, the statement is made, somewhat more euphuistically than comprehensively, that the action was tried in the lower court upon pleadings which charged that "on certain equitable grounds", the company was the beneficial owner of Section 5; but it must not be forgotten that the so-called "certain "equitable grounds" had their foundation in that fraud so vociferously asserted by the complainants, and so completely rejected by the appellate court. The learned trial judge did not decree that Mr. Noyes should transfer Section 5 to the Presidio Mining Company "by "preparing deed, etc."; on the contrary, he decreed that William S. Noyes should transfer Section 5 to the Presidio Mining Company, and that he should be credited with the purchase price thereof, together with interest thereon at the rate of seven per cent per annum from January 25, 1913.

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One of the most interesting observations contained in the printed argument for the receiver will be found on pages 5 and 6 thereof; it deals with the respective points of view of the learned trial judge and of this court, and after suggesting that this court dealt with Section 5 "apparently upon a different ground" from that upon which the lower court reached its conclusion, went on to say that "while the grounds of the "two courts in form are not identical, in essence they "are". The fact, however, is that in the lower court, from the beginning of the hearing to the end, the complainants bottomed their case upon the thought of fraud: every act of their opponents was fraudulent, no act of their opponents was honest; and because of

this all-pervading fraud relief was asked in the amended prayer to the amended bill which involved the very extinction of the corporation. And this claim was responded to by the learned trial judge, not only in his oral opinion, as we have pointed out in our opening brief, but also in his interlocutory decree, the primary finding in which is

“that defendants other than Presidio Mining Company, as its majority stockholders, directors and officers since December, 1912, in conducting its affairs, each, every and all have been and now are guilty of fraud upon the Presidio Mining Company and its minority stockholders” (Trans. 3253, page 424).

This thought of fraud permeates the interlocutory decree from end to end: the remaining provisions of that decree are merely applications to special matters of the general finding of fraud; and nowhere is the accusation of fraud more rampant than in that portion of the interlocutory decree which dealt with Section 5, all dealings of Mr. Noyes with reference to that section, and all claims of his having any relation thereto, being pronounced fraudulent and illegal. The entire case before the learned trial judge was attempted to have been built up upon this cardinal thought of fraud, but no successful pretence can be made that any transfer of Section 5 to this company which was directed by the decree of *this court* to be made, was based upon any fraud of William S. Noyes, or that such decree was based upon any other foundation than the repeatedly expressed willingness of Mr. Noyes to make that very transfer.

What, upon the other hand, was the attitude of this court? Was the attitude of this court in essence identical with that of the lower court? The assertion of the attorney for the receiver is that in essence the grounds of the two courts were identical, though differing in form: but if this were so, why was it that this court rejected and rejected properly the complainants multiform accusations of fraud, cleared the appellants from that accusation, and put the transfer of Section 5 upon a ground essentially and fundamentally distinct from any which involved the faintest tincture of fraud? According to the one court, the trial court, the transfer of Section 5 was coerced by reason of the alleged fraud claimed by the complainants: in the other court, that transfer was the outcome of the desire and willingness of Mr. Noyes, publicly and repeatedly expressed, to transfer the section to the company upon payment of its purchase price and incidental moneys, and wholly independent of any atom of fraud whatever.

On page 6, after referring to the condition of the pleadings, it is said that this court "On the whole case" followed the judgment and opinion of the lower court: but what "whole case"? The "whole case" of the complainants below had been one of fraud: in the Appellate Court this claim received its quietus and the defendants were absolved from the untruthful accusation: is this "following the judgment and opinion of the lower court"? It is then stated that this court "found that it was equitable that William S. Noyes should convey Section 5 to the Presidio Mining Company": when did William S. Noyes ever claim that

such a conveyance would be inequitable? And why did this court find that it was equitable that this conveyance should be made? Was it because of the charges of fraud on which the complainants had so harped, or was it because of Mr. Noyes repeated offer to make the conveyance upon receipt of payments to which it has been adjudged he was entitled?

There is at the top of page 7 a statement which looks very much like an admission that the receivership complained of was unnecessary: but it is put upon the fact that certain matters appeared to the court from the testimony of Mr. Noyes; and while we quite agree that the testimony of Mr. Noyes was entitled to the fullest weight in the determination of the case, we think also that attention should be directed to that of other witnesses whose clearcut testimony corroborated him, and corroborated him without a shadow of contradiction. On page 7 it is said that this court made its decree relative to the conveyance of Section 5, evidently for the reason that had the action been dismissed, an estoppel might arise against the company growing out of its answer; but we find no such reason stated in the opinion: we find the court saying that:

No Accord
Between
Trial and
Appellate
Courts.

“Upon this evidence we did not direct the dismissal of the action as we might have done and as the defendants insist we should have done and should do now; but in view of all the circumstances, in the interest of what appeared to be the substantial rights of the parties and an equitable and economical disposition of the controversy, we treated the action as in the nature of a notice for the specific performance of an agreement to sell Section 5 with a notice to terminate the lease of November 19, 1913, in accordance with its terms and an accounting that would provide for the conveyance by Wm. S.

Noyes of Section 5 to the Presidio Mining Company upon the payment to him of the purchase price, together with interest and all taxes and assessments paid by him during the ownership of the property in accordance with his repeated offer. This was a remedy within the sound discretion of the court and we deemed it appropriate to the circumstances of the case and authorized by the direction contained in Section 269 of the Revised Statutes of the United States, as amended by the act of February 26, 1919 (40 Stat. 1181)'';

and thus, having before us the actual statement of the court itself, counsel's speculation as to the reason for the decree ceases to be of any interest. We are unable to understand what is meant, therefore, by the statement on page 7, that both courts "were in accord "upon the principal object of the amended bill". We assume that the object of a pleading will be found within its four corners; and when we contrast the amended bill, especially as lit up by the amended prayer to the amended bill, with the contents of the two opinions of this court, we fail to see, as pointed out in our opening brief, a single material feature as to which the two courts were in accord.

The statement at the top of page 8 to the effect that this court found that Mr. Noyes had "in effect" promised to convey comes to us with something of a surprise: we know of no authority for this statement: Mr. Noyes did not "in effect" promise to convey; and from the beginning to the end Mr. Noyes promised and declared in plain and *unmistakable* terms his desire and intention, his set purpose and his willingness, to convey, asking only what he was entitled to, viz.: that he should be made whole upon his expenditures. There can

be no mistake about Mr. Noyes' attitude in this matter: his purpose was so plain that the swiftest runner might readily read it; and what he had to say on this topic was not something said "in effect", but it was something said with the most obvious clarity and distinctness. On the same page we find repeated the statement that "on "the whole case the substantive part of the judgment " of the lower court was affirmed": but since we have already sufficiently analyzed this thought in our opening brief, we do not stop now further to develop its insubstantial character.

The remaining portion of the printed argument for the receiver is given up to the claim, in substance, that the present appellants should have appealed in each instance when an interim report was filed by the receiver and ruled upon by the lower court: but, we respectfully insist that the action of the lower court in dealing with the interim reports of the receiver was not final. The record shows that upon various occasions prior to the filing of the fourth and final account, the receiver from time to time presented to the lower court reports of his administration: the presentation of these interim reports provoked no change in the attitude of hostility to the receivership which steadily characterized these appellants: but the interim reports were approved by the lower court, and a summary of its action in this connection will be found in the objections of these appellants to the fourth and final account of the receiver. In the brief filed herein on behalf of the receiver, it is suggested that each of the orders of the lower court prior to the order confirming the fourth and final

Receiver's
Interim
Reports
Not Final.

account, was a final order not appealed from, the obvious suggestion being that no inquiry may now be made into those prior orders. But this receivership was continuous throughout the whole of the period covered by these various reports and until the redelivery of the property by the receiver to its owners after the application for a writ of certiorari had been denied by the Supreme Court of the United States, and it was the intention and expectation of the present appellees and of the learned judge of the trial court who made these interim orders that this receivership should be continued,—the continuation of the receivership was an essential ingredient in the situation in which the interim orders were made. This being so, the following language from a frequently cited California case becomes pertinent, it being steadily borne in mind that while the order of the court in that case stated in words that the receiver should continue in charge of the property of the parties, nevertheless, the same purpose actuated the learned trial judge in the cause at bar, and that, too, as obviously as if he had put his purpose into visible words:

“It is not a question whether one aggrieved by such an order has the right of appeal,—that must be conceded,—but when such right may be exercised. We have not found any case in which such an order has been reviewed before final judgment. No good purpose could be subserbed by a rule authorizing an appeal from every order of this kind made during the pendency of the suit. It is the policy of the law to discourage litigation piecemeal. The order of the court concludes with the following direction: ‘It is further ordered that said receiver

be and continue in charge of the property of said parties herein, and that he continue to act as receiver herein until the further orders of this court in the premises. Said receiver is hereby disallowed any compensation or attorneys' fees until the coming in of his final report herein on final determination of this cause, such compensation and attorneys' fees to be then fixed by the court as it may be then advised'. There are authorities holding that a receiver may appeal directly from an order made before judgment disallowing his final account; and it may be conceded that a party aggrieved by an order of the court, made before judgment allowing a final account of a receiver, may appeal without waiting for a final judgment in the case; that is not this case. The provision of the order quoted above shows that the receiver is still in possession of the assets of the firm, and acting on its behalf, under orders of the court. There will be other reports to make. The final account will refer to previous reports filed, and when that is settled any one aggrieved will be fully protected by an appeal, either from the final order or from the judgment. It may happen that those who object to the acts of the receiver during the first part of his administration will be entirely satisfied with the general result, and have no objection to the approval of his final account of the whole matter."

Rochat v. Gee, 91 Cal. 355, 357-8.

In point of fact, upon the coming in of the final report of such a receiver, facts might be developed which would disentitle him and his counsel to receive any compensation, even if they did not put the receiver in a position tantamount to that of a debtor to the enterprise of which he had temporary control.

Second.

THE AUTHORITIES HEREIN.

Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership, and in such case receiver will be required to return the property to the defendant without deduction.

In our reply brief for appellants on rehearing of the main case in this court, we discussed the question now under consideration with the hope that this court might then have seen fit to express its views for the guidance of the trial court in settling the account of the receiver. We stated our position thus:

Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership (p. 35).

We further contended that a careful reading of the cases which are claimed to be in conflict with the foregoing statement will be found to be cases in which the appointment of a receiver was made *with the consent of the opposing party, either express or implied*, by not resisting such appointment with all the power at his command. None of the cases cited by our opponent, when adequately analyzed, controvert this position; on

the contrary, all the cases cited by appellees will be found to be cases involving *consent*, and are therefore in nowise in point. In this case the outstanding feature is unremitting and successful opposition.

Since writing the foregoing we have examined many decisions dealing with this question of costs and expenses of receivership, and have not found one which is in conflict with the propositions of law stated above.

On the former appeal the receiver was not before the court and we did not discuss what logically follows from the foregoing principle of law, *that the receiver must return the property to the defendant without deduction.*

We now, therefore, state our position on this appeal as follows: *Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership, and in such case receiver will be required to return the property to the defendant without deduction.*

The appellees, of course, endeavor to controvert these propositions of law. We will now present the authorities which support the above statement of the law, and will later return to a discussion of their authorities, and show wherein they fail to support their contentions.

Where the court is without jurisdiction in the main case, either of the parties or the subject matter of the suit, but nevertheless appoints a receiver of the prop-

erty of the defendants, the court is, of course, without jurisdiction to make the appointment, and by merely finding itself in the possession of the property, cannot order a charge to be imposed upon it.

There is only one possible exception to this rule and that is where the plaintiff seeks the appointment of a receiver and the defendants appear in court and consent that the receiver be appointed. While as a rule jurisdiction cannot be conferred by consent where it otherwise does not exist, nevertheless, as the receivership is an independent side issue, and as the court was placed in the possession of the property by the consent of the defendant, and was led by him to incur expenses in its care and administration, it has been held that the court in discharging the receiver may direct that his costs and expenses be paid out of the property. This exceptional rule was followed by the *Supreme Court in Palmer v. Texas*, 212 U. S. 118, a case cited by the appellees, to which we shall make further reference hereafter.

The general rule that an order allowing compensation, based upon a void order appointing a receiver, is itself void is laid down by the Supreme Court of California in *Sullivan v. Gage*, 145 Cal. 759-769, where that court said:

“And in *Grant v. Los Angeles etc. R. R. Co.*, 116 Cal. 71, it was contended by appellant that, as the order appointing the receiver was absolutely void upon its face for want of jurisdiction in the Court to make it, the order fixing the compensation of the receiver, being founded thereon, was equally void, and this Court, after discussion, summed the matter up in the following sentence: ‘That order (appointing the receiver) being void, the

present order must of necessity be held *as to appellant* likewise void'. So here it must result that the order allowing compensation, being based upon a void order appointing the receiver, is itself void."

In *Haues v. First Nat. Bank of Madison*, 229 Fed. 51-59, the United States Circuit Court of Appeals for the Eighth Circuit states this general rule thus:

"Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the Court."

While we contend that in this case at bar, the trial court had no jurisdiction to appoint the receiver, because from the date of the filing of the bill of complaint and throughout the trial down to the entry of the interlocutory decree on the main case, no facts were developed which showed necessity for a receiver, nevertheless we contend, aside from the question of jurisdiction, and on the ground that we resisted the appointment of the receiver at every stage of this litigation and resisted successfully by obtaining the judgment of the court that the appointment was illegal, improper and unnecessary, that the costs and expenses of the receivership must be adjudged against the complainants, and that the receiver must return to these defendants the property which came into his hands as receiver, without deductions with the exception of such expenditure as the defendant, Presidio Mining Company, would have been compelled to make in the conduct of its mining business had no receiver been appointed.

The pertinacity with which the complainants pursued their course to have the receiver appointed, as well as the manner in which the defendants resisted the appointment is set forth in "Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver" which will be found in the record on this appeal (No. 3896) on pages 356 to 430 both inclusive.

The rule which we have stated above and for which we contend has met with approval by the U. S. Circuit Court of Appeals, Fifth Circuit, in *Beach v. Macon Grocery Co.*, 125 Fed. 513, where the court, speaking through Shelby, Circuit Judge, says, at page 515:

"It is a principle of general application that, if the appointment of a receiver is erroneous or void, and the adverse party does not acquiesce in it, but continues to contest it to a successful termination, any compensation which may have accrued to the receiver in the meantime and his expenses incurred in the administration of the estate, should be taxed to the parties who applied to have the appointment made. On the other hand, if the appointment of the receiver is sustained, and the applicant obtains the relief sought by him in the pending suit, the items of expenses growing out of the receivership are proper charges against the unsuccessful defendants, and are chargeable and payable from his property in the possession of the court. We do not understand that the learned counsel for the respondents controverts these general rules. His position is that, the expenditure in question, having been made to preserve the property, is not an expense of the receivership within the meaning of the mandate, and that under the circumstances of this case the \$325 paid to feed and care for the stock is not 'an expense of receivership'. Authorities are quoted to sustain this contention. Excerpts from three cases are quoted. On examination of the cases we think that they do not sustain the contention.

The point decided in *Cassidy v. Harrelson*, 1 Colo. App. 458; 29 Pac. 525, is but an affirmation of the general principle that, 'a receiver having been appointed by the court on application of the interveners in a cause wherein they were not entitled to intervene, the costs incident to the appointment were properly chargeable against them'; that is, against the unsuccessful parties."

Clark on the Law of Receivers, Vol. 1, page 887, states the rule in quoting approvingly from *Frick v. Fritz*, 124 Iowa 529, as follows:

"But where the right of the plaintiff to subject the property for which he seeks to have a receiver appointed to the payment of his claim is resisted from the beginning, and the effect of the appointment of a receiver is to subject to the control of such receiver property in which the plaintiff is, as the result of the litigation, found to have had no interest or right whatever, it would evidently be unjust that after determination of the case against the plaintiff he should be allowed to have the expenses of the receivership which he has occasioned by his unfounded claim, and from which the opposite party derives no benefit, satisfied out of the property itself. Such a result would be inequitable, for it would throw upon defendant the burden of a litigation instituted by plaintiff without right."

In the case of *Hawes v. First National Bank of Madison*, 229 Fed. 51, decided by the Circuit Court of Appeals in the Eighth Circuit, we find the following statement of the rule at page 59:

"Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment of such receiver. *Machinery Co. v. Hughes*, 195 Ill. 413; 63 N. E. 186; 59 L. R. A. 673; *McAnrow v. Martin*, 183 Ill. 467; 56 N. E. 168; *Higley v. Deane*, 168 Ill. 266; 48 N. E. 50; *State v. People's U. S. Bank*, 197 Mo. 605; 95 S. W. 867; *Cutter v. Pollock*, 7 N. D. 631; 76 N. W. 235; *Ephraim v. Pacific Bank*, 129

Cal. 589; 62 Pac. 177; High on Receivers (3rd Ed.), Sec. 796; Beach on Receivers, Sec. 774.

In the case at bar, the court, being without jurisdiction, has no property with which to pay any one, and hence is not ruled by *Atlantic Trust Co. v. Chapman*, 208 U. S. 360; 28 Sup. Ct. 406; 51 L. Ed. 528; 13 Ann. Cas. 1155. Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court."

"Reversed and remanded, with instructions."

In *Cabaniss v. Reco Mining Co.*, 116 Fed. 318, the Circuit Court of Appeals, Fifth Circuit, found, as this court found on the former appeal herein that the bill possessed no equity. The court said, at page 322:

"This bill seems to us to be clearly without equity, and it affords no sufficient basis for an order appointing a receiver;"

and on page 324, the opinion proceeds as follows:

"The order appointing a receiver herein is reversed and annulled, and the receiver appointed is discharged; and he shall forthwith turn over and deliver all property held by him as receiver to the party or parties from whom he received it; and this case is remanded with instructions to pass upon the receiver's accounts and compensation, all costs in the Circuit Court and expenses of receivership to be paid by the complainant in the three bills; and each party to the appeal will pay his own costs on appeal (*Rogers v. Durant*, 106 U. S. 644; 27 L. Ed. 303); and the Circuit Court is directed to dismiss all the bills in the consolidated case without prejudice."

In *Link Belt Machinery Co. v. Hughes*, 195 Ill. 413; 59 L. R. A. 673, it is said at page 679 (L. R. A.):

"Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the court, the costs of the receivership may be taxed against the complainant procuring the appointment of

such receiver. In *Highley v. Deane*, 168 Ill. 266; 48 N. E. 50, the complainant was ordered to pay the costs of the proceeding and costs and expenses of the receiver. In *McAnrow v. Martin*, 183 Ill. 467; 56 N. E. 168, it was said that, when the appointment of the receiver is without authority of law, the court should order the complainant in the suit to pay the receiver's charges and disbursements, as a part of the costs in the case. In case of the illegality of the appointment of the receiver, and where his compensation is to be paid by the complainant who obtains such appointment, the amount of the receiver's compensation should be taxed against the complainant, the unsuccessful party in the cause. *High, Receivers*, 3rd ed. p. 796; *Radford v. Folsom*, 55 Iowa 276; 7 N. W. 604; *Highly v. Deane*, 168 Ill. 266; 48 N. E. 50."

The rule for which we contend is also the law in California. In *Lewis v. Hall*, 38 Cal. App. 329, the court says, at page 335:

"As to the plaintiff's appeal from the order charging her with the payment of the receiver's fees, it appears from the record that the appointment was made at the request of the plaintiff, and that the Land Company (who, as we have seen, was in possession of the land) had ample means and was able to respond to the plaintiff for any damages that might result to her from its possession or disposition of the crop. The court in its findings declared that the appointment of the receiver was improvidently and erroneously made. Under these circumstances it would have been manifestly unjust to charge the defendant's property with the compensation of the receiver, and, on the other hand, such expense could legitimately be imposed upon the plaintiff, at whose instance the receiver was appointed. (*Frick v. Fritz*, 124 Iowa 529, 100 N. W. 513; *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168; *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177."

In *Hickey v. Parrott Silver & Copper Mining Co.*, 32 Montana, 143; 79 Pac. 689; 108 Am. State Rep. 510, we

find the Supreme Court of the State of Montana approving the rule for which we contend in the following language:

“ ‘The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in *Hutchinson v. Hampton*, 1 Mont. 39, is nevertheless (in absence of exceptional facts) ultimately taxable to the losing party, whose wrong occasioned the appointment, as was declared in *Ervin v. Collier*, 2 Mont. 605’: *State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883.

‘The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action (citing cases). But this does not preclude the court, upon a discharge of the receiver before the conclusion of the action, as was the case here, from fixing his compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed’: *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613.

“In *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168, the court said: ‘When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment: *Weston v. Watts*, 45 Hun. 219; *French v. Gifford*, 31 Iowa 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige 438; *Radford v. Folsom*, 55 Iowa 276, 7 N. W. 604’. The same doctrine is announced in *Beach on Receivers*, par. 119; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864; *People v. Jones*, 33 Mich. 303; *Welch v. Renshaw*, 14 Colo. App. 528, 59 Pac. 967. As was said in *Ogden City v. Bear Lake etc. Irr. Co.*, 18 Utah 279, 55 Pac. 385: ‘The expenses incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for

it to incur should be charged to the party procuring the order. Such expenses shall be regarded as incurred in consequence of an error at his instance: *Weston v. Watts*, 45 Hun. 219; *City of St. Louis v. Gaslight Co.*, 11 Mo. App. 237; *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321, 35 N. E. 630; *Moyers v. Coiner*, 22 Fla. 422; *French v. Gifford*, 31 Iowa, 428.' See, also, *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 626."

In *Richmond v. Irons*, 121 U. S. 27, the Supreme Court found that "the receiver was not necessary to "the enforcement of the liabilities of the stockholders" of an insolvent National Bank. The court said at page 64:

"The next question arises upon the objections of the appellants to the allowance made in the decree of twenty per cent. of the amount of the debts of the bank due to the date of the suspension, in addition thereto to cover the expenses of the receivership. The sum, we think, ought not to have been allowed. *The ordinary costs of the cause* are, of course, taxable against the defendants as in other cases, but we see no reason why stockholders should be required to contribute as a debt due from the bank, or themselves, to a fund for the expenses of the receivership."

And further at page 66:

"*No receiver is necessary in ordinary cases*, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond an allowance made heretofore and paid, if any, *should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.*"

It is, therefore, the rule in the federal courts and in the State of California, the domicile of the Fresidio Mining Company, that where the appointment of a

receiver is contested and it is finally determined that the appointment was illegal, erroneous or unnecessary, that the costs and expenses of the receivership should be adjudged against the party at whose instance he was appointed. Founded, as it is, on sound equitable principles, the rule seems to be universal.

One of the early cases in which this proposition is laid down is *French v. Gifford*, 31 Ia. 428. In this case, an appeal was taken from the order taxing the receiver's costs in which it was ruled that of his compensation one-third should be paid out of the funds in his hands, and the other two-thirds taxed as costs against the plaintiff in the action. In speaking of the cases where the costs and expenses of the receivership were paid out of the fund, the court said:

"Upon an examination of these cases it will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that in each case the receiver closed up the business and settled his accounts in pursuance of his appointment. * * * We think it would be an unjust and inequitable rule, if in all cases the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule innocent persons might be made to suffer great loss."

In *Lockhart v. Gee*, 3 Tenn. Chan. 332, the court said:

"Having no right to a receiver, the complainant is, of course, liable to the defendant for all the consequences of having had one appointed. Costs of receivership, including the compensation of the receiver must, therefore, be paid by the complainant."

In *Ruling Case Law*, Vol. 23, at page 106, we find the following:

“It may be stated as a general rule, however, that *where there is no question as to the legality or propriety of the appointment of the receiver*, the receiver’s compensation and expenses are payable from the funds in his hands, no part thereof being taxable against the party at whose instance the receiver was appointed. Many cases hold that the receiver is entitled to receive compensation for his services and reimbursement for his expenditures, in the first instance, from the funds which come into his possession, regardless of who is ultimately successful or is ultimately liable to pay them. Where a court has no power or authority to appoint a receiver in any event, *or where, though the court has authority, the appointment is improperly made*, there are numerous decisions to the effect that the receiver cannot have his compensation or expenses paid from the property in his hands, but must look to the party at whose instance he was appointed.”

As said in *Cutter v. Pollack*, 4 Dak. 205, 50 A. S. R. 644:

“If the receiver is allowed to pay, and reimburse himself out of moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for the invasion of his property.”

It is true that in the last mentioned case the court was speaking of a final decree in the suit which, however, included the receiver’s final account. It was a case in which a receiver had been appointed *on motion of the plaintiffs, and against the opposition of the defendants*. The lower court directed that the fees and expenses of the receiver, which, however, were not settled by the court, should be taxed by the clerk of the court as costs in the case against the plaintiff, and that the amount of

the costs should be inserted in the judgment. "These items (said the court), we are clear have no place in a bill of costs". The directions to the trial court read as follows:

"The judgment is reversed, and the district court is directed to enter a new judgment after all matters connected with the receivership have been investigated and settled. But the case will not be reopened for a new trial on the merits. The question of the right of the defendants to the funds in the hands of the receiver is settled, subject to such modification. The district court, without reopening questions touching the merits, will inquire into the amount of property and money in the hands of the receiver, or for which he is properly chargeable; will ascertain what compensation is proper, what disbursements actually made were necessary; will determine whether the receiver shall be paid and reimbursed out of the fund in his hands, and what proportion of his fees and expenses ought to be borne by the plaintiffs and defendants, respectively, or whether the plaintiffs ought ultimately, or in the first instance, to pay all of such fees and expenses. All these matters should be embodied in the findings and the final judgment. We do not wish to be regarded as holding that the decision of the district court upon these various questions will be final. It is possible they may be subject to review. There is also an appeal from an order of the district court made on appeal from the taxation by the clerk of the receiver's fees and expenses as costs, which order affirms such taxation. This order is reversed for the reasons already stated.

All concur."

It follows, therefore, that in making a final disposition of the receivership, the court must decide everything that is essential to such disposition. It must in the first instance determine whether or not the receiver is entitled to any compensation at all. If it decides that he is, it must direct the mode of his payment. If he

shall be paid out of the fund, the court must determine whether such payment is a final disposition of that particular question, or whether the amount of his compensation and expenses shall be restored to the fund by a judgment against the party procuring his appointment. The court may direct him to restore the fund without deduction, and direct a judgment in his favor against the party procuring his appointment; or it may direct that his compensation and expenses be apportioned between the parties according to their respective equities. This phase of the case we have discussed in our opening brief, and will not repeat the arguments here. We there contended that as between the complainants who procured this illegal receivership, and the defendants, the equities are entirely in favor of the defendants, and that the entire costs and expenses of the receivership must be adjudged against the complainants.

On this branch of the case we will do no more than to cite the following cases which are instructive on the general question here involved. An examination of these and many other cases on the subject will develop this principle: that whenever the costs and expenses of the receivership were paid out of the fund it was either (1) a case in which the receivership was legal and proper, or (2) a case in which the appointment of the receiver was erroneous, or even void, but in which the adverse party had either expressly consented to the appointment, or had acquiesced therein and permitted the receiver to proceed in the administration of his duties without protestation.

When in our petition to the trial court to reconsider its order to appoint the receiver, we offered to pay into court the sum of \$61,155.60 to be held by the court

“as a bond to insure the payment of any money judgment which the complainants may recover, either for the benefit of the Presidio Mining Company, or for the benefit of themselves as and for costs and counsel fees in this suit”,

this court in its opinion on rehearing said:

“Why was not this offer sufficient security for any decree that might be entered in the case” (270 Fed. at 402).

We now ask can the complainants in the face of this offer and this finding successfully contend that they sought the receivership in good faith? And when the receiver is shown *to be appointed and continued* through fraud or illegal conduct of the parties asking for such receiver, costs and expenses of the receivership should be charged against such parties. *Miller v. Am. Light, etc. Co.*, 181 Ill. App. 623.

The additional cases to which we have referred are the following

Federal cases.

Harrington v. Union Oil Company, 144 Fed. 235;

McIntosh v. Ward, 159 Fed. 66;

Fryer v. Weakley, 261 Fed. 509;

Amer. Engineering Co. v. Met. By Products Co.,
280 Fed. 677, 682;

Cooper v. Shirley, 75 Fed. 168 (9th Circuit);

In re Locov, 142 Fed. 960;

Chicago Title Co. v. Newman, 187 Fed. 573;

Wallace v. Loomis, 97 U. S. 146;

In re T. E. Hill Co., 159 Fed. 73;

Huff v. Bidwell, 218 Fed. 6.

State cases.

- Lockhart v. Gee*, 3 Tenn. Ch. 332;
Myers v. Hines, 182 S. W. (Ark.) 542;
Excelsior etc. Co. v. Rieff, 155 S. W. (Ark.) 921;
Burroughs v. Merrifield, 90 N. E. (Ill.) 750;
Bellamy v. Washita etc. Co., 25 L. R. A., N. S. 412;
Nutter v. Brown, 1 L. R. A., N. S. 1083;
Brock v. Rudug, 119 N. E. (Ind.) 491;
Herndon v. Huter, 19 Fla. 397;
Verplank Mercantile Ins. Co., 2 Paige 438;
French v. Gifford, 31 Iowa 341;
Central Trust etc. Co. v. Chester etc. Co., 80 Alt. 801 (Del.);
Frick v. Fritz, 124 Iowa 529;
Miller v. Am. Light, etc. Co., 181 Ill. App. 623;
Hendric Mfg. Co. v. Parry, 86 Pac. (Colo.) 113;
Welch v. Renshaw, 59 Pac. (Colo.) 967;
Tome. v. King, 21 Atl. (Md.) 279;
McAndrow v. Martin, 183 Ill. 467;
Weston v. Watts, 45 Hun. 219;
Higley v. Dean, 168 Ill. 266;
Hickey v. Parrott etc. Co., 32 Mont. 143; 108 A. S. R. 510;
Carroll v. Haigh, 108 Ill. App. 264, 269-270;
Howe v. Jones, 23 N. W. (Iowa) 376;
Phillip v. Hudson Film Co., 143 N. Y. S. 759;
Link Belt Machinery Co. v. Hughes, 195 Ill. 413;
City of St. Louis v. St. Louis Gas-Light Co., 11 Mo. App. 237;
Radford v. Folsom, 55 Iowa, 276;

People v. Jones, 33 Mich. 303;
O'Mahoney v. Belmont, 62 N. Y. 133;
Grant v. Los Angeles Ry., 116 Cal. 71;
Cassidy v. Harrelson., 1 Colo. App. 458; 29 Pac.
 525;
Sullivan v. Gage, 145 Cal. 759.

A MORE COMPLETE ANALYSIS AND CRITICISM OF APPELLEES' AUTHORITIES.

In support of the contrary proposition: that the liabilities which the receiver incurs are in any event liabilities chargeable upon the property under his control, the receiver cites: *Atlantic Trust Co. v. Chapman*, 208 U. S. 360; *People v. Oriental Bank*, 114 N. Y. Supp. 440; *Sullivan Timber Co. v. Black* (Ala.), 48 So. Rep. 870; *Palmer v. Texas*, 212 U. S. 118.

But none of these cases even remotely support the contention of the receiver and the other appellees

The case of *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, was not a case in which the defendant resisted the appointment of the receiver, and took an appeal from the order of appointment, and secured a discharge of the receiver. We read on page 366:

“The court, on the motion of the Trust Company, the Canal and Irrigation Company *appearing and consenting thereto*, appointed E. C. Chapman receiver of the mortgaged property with the authority to take possession of it”;

and at the beginning of the opinion we find this statement:

“The principal question in this case—now before us upon writ of certiorari for the review of a final order of the Circuit Court of Appeals for the Ninth Circuit—is stated by counsel to be this: Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?”

Again on page 375, the court says,

“Here, it is not asserted that the plaintiff trustee was not in the exercise of his strict rights when bringing a suit for foreclosure and sale and asking that the property be put in possession of a receiver.”

How different from the case at bar!

Referring to *People v. Oriental Bank*, 114 N. Y. Supp. 440, the receiver quotes a few lines from the opinion (separated from the facts) which he emphasizes; but as a matter of fact nothing is decided by the court except that it will not take up the exceptions to the receiver's account until that account comes before it after passing under the scrutiny of a referee. Here is the short opinion in full:

“*Per Curiam.* It accords with the long-established practice of the court to subject the accounts of receivers to the scrutiny of a referee before passing upon them, when, as in the present case, large sums have to be accounted for. The questions sought to be raised by the

exceptions can best be disposed of on the coming in of that report. It cannot be said now, as matter of law, that the receivers are entitled to no compensation because the order appointing them was vacated. That vacation did not proceed upon the ground that the court was without jurisdiction to appoint receivers *ex parte*, but upon the ground that, having such jurisdiction, it was improvidently exercised. When all the facts are before the court, it can be determined what allowance, if any, should be made to the receivers for their compensation and expenses. The order is not drawn in the usual form, and should be modified, so as to provide that the accounts of the receivers and the objections thereto be referred to the referee named in the order appealed from, and that he report thereon, with his opinion, as well as upon the question as to what compensation and expense, if any, should be allowed to the receivers, and by whom the same should be paid, and, as so modified, will be affirmed, without costs in this court.

Settle order on notice."

We are next referred to the case of *Sullivan Lumber Company v. Black*, 48 So. Rep. 870. This is a case in which the Supreme Court of Alabama decided that under the law of that state the compensation of the receiver, and fees for his attorney, should be paid out of the fund in the first instance notwithstanding the fact that the receiver was improperly appointed, and the bill was ordered dismissed, because in Alabama there is a statute providing that before a receiver can be appointed, he must execute a bond conditioned that he will pay all damages which any person may sustain by his appointment as such receiver, should his appointment be vacated.

The court says:

"It may be said that a sufficient answer to the argument (that the receiver's costs and expense should be

taxed to the complainant) is that before the complainant could have himself appointed receiver *under the laws of this State*, he was required to execute a bond conditioned that he would pay all damages which *any person might sustain by reason of his appointment* as such receiver, should his appointment be vacated. As the appointment has been vacated, the *respondent*, as well as all other persons, have a remedy by action upon the bond to recover all such damages as they may have sustained."

Alabama is not a Code state, and the Courts of Equity and Law exist distinct and separate, and the court held that it had no jurisdiction as a court of equity to enter a judgment upon the bond. The court says, at page 877:

"The Chancery Court is not the proper tribunal, nor is the present action the proper one, in which to determine the amount of damages, if any, which the respondents or others may have sustained by the appointment of the receiver. So, if the respondents have suffered damages by reason of the receiver, or unauthorized act of the complainant in having the receiver appointed, they are not without remedy, whatever may be the decree of the Chancery Court or of this Court in allowing or apportioning the costs in the Chancery Court. It may be that it would be better for all of these matters to be determined by the same tribunal and in the same action, yet such is not the law nor the practice in this State. What we have said above, of course, is not intended to control in any action that may be brought in a court of law upon the receiver's bond, but is only intended as an answer to the persuasive arguments of the learned counsel against the decree of the Chancellor, which is in most things affirmed by this Court."

We respectfully submit that the quotation made by counsel in his brief, separated from the facts of the case, is misleading.

The receiver then (pp. 10, 11, 12 and 13) enters into an elaborate analysis of the case of *Texas v. Palmer*,

(212 U. S. 118). We substantially agree with the analysis, but not with the conclusion that the case "is on all-fours" with the case at bar as to the principle involved.

In the first place, when the plaintiff Palmer walked into the federal court asking for a receiver, the defendant corporation stood by his side and joined in the prayer. (1) Here was consent to the receivership; and the defendant by its consent was more responsible for the appointment than was Palmer himself who was a small stockholder in the corporation. (2) The corporation defendant had given a supersedeas bond in the state court proceedings and was, therefore, entitled to remain in possession of its property pending the appeal in the state court. But it saw fit in the meantime to have a receiver appointed over its property in the federal court. Why should it not pay for the care and custody of its property? Who can gainsay that Palmer, this small stockholder in the corporation, should not be made the scapegoat, and that under these circumstances "justice will be done if costs of receivership are paid out of the fund realized in the federal court".

Had the Presidio Mining Company in the case at bar expressly consented to the appointment of a receiver, it might be argued with some semblance of logic, that there was a parallelism between the Palmer case and this; but when the *consent* in the Palmer case is contrasted with the *unceasing objection* in this case, the two are "as far apart as the poles" to quote the learned judge of the District Court.

It is further suggested that the State of Texas was the real party in interest, and the payment out of the fund

“would deplete the total of the property which was already insufficient to pay the State’s judgment, and would compel the State to have recourse on the supersedeas bond”.

The answer is that the state was amply protected by the supersedeas bond; did not raise the question, and somebody had to take care of the property pending the litigation. As the receiver had done so with the *consent of the defendant*, he should, of course, be paid for his trouble and reimbursed in his legitimate expenses. After referring to various items of expenditure by the receiver which are claimed to have been made with the consent of the defendants, it is claimed on page 20 of the receiver’s brief that

“all other sums expended by the receiver and objected to and excepted to are covered by the orders of confirmation and allowance for the years, 1918, 1919 and 1920, none of which orders were appealed from, and it is contended that whatever these orders may be as between the parties, based upon the stipulations of the parties or the objections and exceptions made as between them during these years, *that as between the receiver and each of the parties the order of confirmation and the allowance in each instance was a final appealable order as to each item allowed*”.

We will later take up the question as to any consent to any specific item; but will first direct our attention to the effect of the orders of the court allowing the annual accounts of the receiver.

The cases which the receiver cites to the point that the intermediate accounts of the receiver *were appeal-*

able do not sustain his position, with the single exception of *Ruggles v. Patton*, 143 Fed. 312. *Ruggles v. Patton* is, however, in conflict with the rule laid down in this Circuit in the case of *Heinze v. Butte etc. Co.*, 129 Fed. 337; and an examination of the authorities cited in the *Ruggles* case on which the conclusion in that case is founded will disclose the fact that they do not sustain the conclusions there reached.

The *Ruggles* case was decided in the 6th Circuit by Judge Lurton in February, 1906. An appeal had been taken from an order allowing the receiver \$20,000 as compensation for the year 1904. The decision says:

“The case is in narrow compass. The receiver contends that the order is *not final*, because he construes it as a mere payment upon account, and that the fund paid to himself under the order will continue to be subject to the order of the Court, and his bond responsible for obedience to any order settling his compensation at a less sum, and recalling any sum received in excess of compensation allowed upon a final settlement.”

In holding contrary to the receiver's own contention, Judge Lurton cites as his first authority *Williams v. Morgan*, 111 U. S. 684. This was a railroad foreclosure suit, and there was no question as to propriety of the allowance of \$10,000 per annum made to the receiver. But after sale of the road the court made an order allowing the trustees under the mortgage an allowance of \$79,083.28 out of the proceeds. From this allowance an appeal was taken by Williams and Thompson who were the purchasers of the road representing certain bondholders who were entitled to the net proceeds. The order settled an independent side issue in the case, quite foreign to the administration of the receiver, and

had no bearing upon any interlocutory order approving the accounts of the receiver. In fact it is difficult to understand why an order such as was made in the Ruggles case would not be appealable if no receiver had been appointed.

The next case cited by Judge Lurton is his own decision *In re Michigan Cent. R. R. Co.*, 124 Fed. 727. The substance of that case is thus stated in the syllabus:

“A decree of the Circuit Court against a litigant, allowing costs to the clerk as a matter of positive law, under a statutory provision, is not one made in the exercise of the Court’s discretion, as in the allowance of costs as between the parties, and is appealable.”

Judge Lurton himself says at page 734:

“Nor is it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest.”

On page 314, last paragraph, the opinion in the Ruggles case contains this statement:

“We think that the direction that the receiver should pay to himself \$20,000 for a specific service already rendered was a complete withdrawal of that part of the funds from the Court’s possession. The case falls under the authority of *In re Michigan Central Ry. Co.*, cited above; *Trustees v. Greenough*, 105 U. S. 527, 531, 26 L. Ed. 1157; *Edgell v. Felder*, 99 Fed. 324, 39 C. C. A. 540; *Tuttle v. Claffin*, 88 Fed. 122, 31 C. C. A. 419.”

The Greenough case is not a case involving allowances to the receiver and his counsel, nor expenditures voluntarily made by the receiver and reported by him

to the court, and approved by it by an interlocutory decree; but it was a case in which a plaintiff Francis Vace, suing on behalf of himself and other bondholders, had brought a large fund into court, and expended large sums of money in this behalf before a receiver was appointed. After the appointment of the receiver, Vace filed his petition seeking reimbursement out of the fund which he had thus brought into court. The court allowed him \$60,131.96, and the appeal was from this order of allowance. The Supreme Court said (p. 531):

“The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant’s petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.”

The Greenough case did not involve expenditures in the receivership at all, and does not support the doctrine of the Ruggles case, and this fact is pointed out by Judge Gilbert of this court in the Heinze case where, at page 338 (129 Fed.) we find the following comment:

“It is true that the Supreme Court has recognized an exception to the general rule that an order made be-

fore the final disposition of a cause, and before the final account of a receiver is filed, is not appealable, in the case of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. That was an appeal from an order directing that the complainant in the suit be paid out of the fund in the receiver's hands the costs, expenses, and counsel fees incurred by him in a suit which he had brought against the trustees of bonds issued by a corporation and secured by a trust fund, to secure the due application of the trust fund and prevent the waste thereof, the result of which suit was to bring the fund under the control of the court for the common benefit of all the bondholders. The expenses and fees were not incurred by the receivership, but preliminary thereto, and in preserving the trust fund from waste. The court, not without apparent hesitation, sustained the appeal, on the ground that the order was a final decision in a collateral matter. Said the court, 'Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision'."

Engell v. Felder, (99 Fed. 324), is another case cited by Judge Lurton in the *Ruggles* case, which does not involve expenditures in the receivership, but an entirely independent collateral matter. The question involved is thus stated in the syllabus:

1. APPEAL—FINAL DECREE.

A decree in favor of persons not technically parties to the suit, but whose appointment and employment therein had been authorized by the court, to render designated services, and whose claims for compensation, on proper petition of the special master and on due hearing, were fully adjudicated, and ordered to be paid out of the fund in the registry of the court, as a part of the costs of administration of the same, which decree provides for its immediate execution, by ordering that the clerk draw checks, for the signature of the judge, on the fund in the registry of the court, for the allowances made to the claimants, is a final decree, for the purposes of appeal.

2. SAME—PARTIES—RECEIVER.

The fund affected by a decree for payment of persons employed by authority of the court, in a suit in which a receiver was appointed, being in the registry of the court, and the payment being ordered by a check drawn by the clerk of the court, and signed by the judge, the receiver is not affected by the decree, and hence is not a necessary party to an appeal therefrom."

The last case cited by Judge Lurton in the Ruggles case in the above quoted summary is *Tuttle v. Clafin*, 88 Fed. 122; 31 C. C. A. 419, and this likewise does not involve expenditures in the receivership, but an outside independent collateral matter, which is summarized in the syllabus as follows:

3. SAME—APPEALABLE FINAL DECREE.

A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree, although the residue of the fund may not have been finally disposed of.

It thus becomes apparent that Judge Lurton in the Ruggles case entirely overlooked the distinction between an order directing the payment of money in an independent collateral matter arising in a suit, and the expenditures by a receiver in the receivership. In the Heinze case Judge Gilbert points out that the ruling in the Greenough case was followed in *Hovey v. McDonald*, 109 U. S. 150; *Williams v. Morgan*, 111 U. S. 684; *Tuttle v. Clafin*, 88 Fed. 122; and *Grant v. Los Angeles, etc. Ry. Co.*, 116 Cal. 71, and then says:

"But we find no decision holding that an appeal may be taken from an interlocutory order confirming a receiver's report, or directing the receiver to pay expenses incurred by him, before the coming in of his final ac-

count, except the decision of the Supreme Court of North Carolina in *Battery Park Bank v. Carolina Bank*, 36 S. E. 39, where the appeal was sustained, not upon any recognized principle applying to appeals from interlocutory orders, but upon the ground that such an order is in effect a final appropriation of a part of the assets, and 'no harm can come to any one interested in the suit by regarding it as final'."

Indeed, we may add that after an exhaustive research up to the present time we have found none other with the exception of the *Ruggles* case; and counsel for the appellees have been no more successful than ourselves.

On page 22 of his brief the receiver refers us to the following quotation from the *Ruggles* case:

"The fact that he was the Court's receiver and that he continues to be the Court's receiver gave the Court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect than it could exercise over any other party obtaining funds through the order of the Court."

We respectfully submit that this is the statement of an unsound principle of law. Where a party or a stranger files a petition in a suit seeking to have paid to himself all or a portion of a fund in court, he initiates an independent proceeding in the suit, and if the petition is by a stranger, the court acquires jurisdiction over him in so far as this independent proceeding is concerned. If his petition is denied, that is a final disposition of the matter, and the petitioner has the right of appeal; and conversely, if the petition is granted that is likewise a final disposition of the matter, and any one interested in the fund has the right of appeal. If no appeal is taken, the court loses jurisdiction over

the petitioner with the expiration of the time for appeal. But not so with regard to the receiver. He is an officer of the court, and the court's jurisdiction continues over him, and all his proceedings and the matters in his charge until his final account is settled, and then until the time has expired for appeal from the order settling his final account. In regard to an order directing the payment of a fund in court to a party or a stranger upon his petition, the rule we have stated would be the same if there were no receiver in the suit. The fact that there is a receiver, and that the court directs the receiver to pay the money, is a mere accidental incident in the proceeding. It was the failure of Judge Lurton to observe this fact that led him to cite such cases as *Trustees v. Greenough* and *Williams v. Morgan* as authority for his conclusions in the Ruggles case which led him into a fundamental error.

Also on page 22 of his brief the receiver cites *Pennsylvania Co. v. Pennsylvania*, 266 Fed. 1, a case which cites the Ruggles case and the Greenough case. But a reading of the case, as well as the receiver's own statement of it, shows that here was a petition by one of the parties to the main suit "to be reimbursed for moneys it had advanced". The petition was granted in part and the receiver and other parties appealed. Here again the receiver was a mere incident. If the fund directed to be paid had been in the hands of the clerk of the court, the identical questions of law would have been presented.

Finally the receiver in closing his citation of authorities, page 24, says:

“The above case of *Ruggles v. Patton* is also approved in the case of *Bankers Trust Company v. Missouri, etc., Ry. Co.*, 251 Fed. 789, which was a receivership, and an administrative order was held to be a final order, the Court (bottom of p. 796) saying:

‘The compensation of receivers is usually fixed by administrative orders, *and those orders are reviewable by the Appellate Court generally as interlocutory, but some times as final orders.*’ ”

Following this quotation the court cites *Ruggles v. Patton*, 143 Fed. 312; 74 C. C. A. 450.

Then counsel continues:

“The reasoning of the Court in the last case following the above excerpt would lend support to the intimation in the opinion in the Heinze case, commencing on p. 339 (129 Fed.), that whenever the orders approving the receiver’s account are held to be interlocutory, they are subject to review on appeal from the final decree disposing of the entire case, but would not help appellants on this appeal, *because such a final decree is yet to be entered.*”

But right here we differ with counsel, as we have pointed out in another part of this brief. We claim that the court committed error when it split its order by settling the final account of the receiver and discharging him and exonerating his bond. But in *Bankers Trust Co. v. Missouri K. & T. Co.*, no settlement of a receiver’s account, interlocutory or final, was under consideration at all. The orders there under consideration were administrative orders consolidating various suits foreclosing mortgages on a complicated system of railroads and extending a receivership to these vari-

ous consolidated suits; and immediately after the quotation made by the receiver that "the compensation of receiver is usually fixed by administrative orders, and these orders are reviewable by the appellate courts *generally* as interlocutory, but sometimes, as final orders, *Ruggles v. Patton*, 143 Fed. 312, 314, 315; 74 C. C. A. 450, 452, 453", the court proceeds:

"The general rule is that, upon an appeal from the final order or decree in a proceeding in equity, such as a foreclosure suit, or foreclosure suits, all the preceding interlocutory orders and decrees, affecting the rights or equities of the parties regarding the matters in controversy between them, are subject to review in the Appellate Court, and may be heard and decided at the same time."

The receiver had not filed a final account and had not been discharged. The court was not dealing with a *split order* designed to be final as to certain matters and interlocutory as to others. It was dealing solely with "administrative orders", and states its conclusion (251 Fed. at 797) as follows:

"The conclusion is that, as appellants were entitled to both the right of review of the administrative orders in question by an appeal from the final order and decree that shall be made *in the causes, and also to the receiver and the impounding of the income for the benefit of its bondholders, and as the clause of the order under discussion completely deprived it of one of those rights*, it was a final decision affecting a substantial right of the appellant and the bondholders he represents, and it made the order which contained it appealable."

So in the case at bar, we say that as the clause in the order from which we have appealed completely deprives the defendants of any relief against the re-

ceiver by settling his final account and discharging him and his bondsman, it is a final decision affecting a substantive right of the defendants and is appealable.

In conclusion we hardly need draw the attention of the court to the fact that it is the law of this case, established in the former appeal, that the appointment of the receiver and his administration was an illegal invasion of the rights and property of the Presidio Mining Company.

Our claim that there was not even a semblance of justification for this receivership, is clearly sustained by this court in the entirety of its several opinions, but is particularly emphasized when this court said, after a full review of the evidence that:

“upon this evidence we did not direct a dismissal of the action as we might have done” (270 Fed. at 405).

Finally, for the convenience of the court we will tabulate the sums involved in this appeal. In the second interlocutory account filed by the receiver (p. 367 of the record on this appeal) will be found an item of \$2500.00 paid to the Master in Chancery as his fee for taking the account ordered by the interlocutory decree of the trial court. As the record discloses, the appellants objected to the taking of this account because an appeal from the interlocutory decree had been taken. The appellees insisted upon proceeding with the accounting and the master overruled appellant's objections. After the master's report had been filed with the court, and the appellants had filed their objections thereto, the court ordered the receiver to pay the master's fees.

This item of \$2500.00 was not expended by the receiver in the course of his administration, but he was ordered to pay the same by the court, and under the principle of *Trustees v. Greenough* (105 U. S. 527), we concede that we should have appealed from the order directing this payment in so far as the receiver was concerned. But on the other hand we contend that the appellees, having wilfully and unlawfully caused the expenditure, should be charged with this item and directed to repay the same to the Presidio Mining Company.

The following is the tabulation mentioned above:

- \$14,729.10 Contained in the receivers first account the objection to which is found on p. 362 of the present record and the subject of Exception XII.
- \$20,900.96 Contained in the second account, the objection to which is found at p. 367, and the subject of Exception XIII (The item of \$2500.00 paid to the Master in Chancery is in this account, leaving other items aggregating said sum of \$20,900.96.)
- \$16,950.00 Contained in the third account, the objection to which is found at p. 373, and the subject of Exception XIV.
- \$ 2,650.00 Contained in the fourth account, the objection to which is found at p. 374, and the subject of Exception XV.

\$55,230.06 At the time of filing the fourth account.

This is the sum of \$57,730.06 mentioned on the last line of p. 428, minus the sum of \$2500.

There was also a balance on hand of \$4475.00 when said fourth account was filed (334), \$59.68 interest collected (505), \$10.00 paid out for clerk's fees, leaving a balance of \$4524.68 (505); the objection to the disposal of that

balance is found at p. 374, the order directing its disposal is found at pp. 505-6, the disposition thereof *on Sept. 29th, 1921*, is shown on p. 508, and Exception X covers the subject.

The total amount involved herein is therefore \$55,230.06, the total of the sums objected to in the four accounts, plus the balance of \$4524.68 subsequently absorbed, making the total sum of \$59,754.74.

In the judgment which should be entered against the complainants, however, the above sum of \$2500.00 should be added, making as to them the total of \$62,254.74.

Dated, San Francisco,
December 23, 1922.

Respectfully submitted,

R. T. HARDING,

HENRY E. MONROE,

Solicitors for Appellant.

J. J. DUNNE,
Of Counsel.

No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation),
WM. S. NOYES, B. S. NOYES, L. OSBORN,
JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

VS.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

CLOSING BRIEF OF APPELLEES.

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

HORATIO ALLING,
Of Counsel.

FILED

JAN 21 1908

F. D. HONOLULU.

SUMMARY OF POINTS.

1. The lower court acted within its jurisdiction in appointing the receiver and the receiver's possession and his rights as to compensation and expenses were the same as they would have been had his appointment not been held to have been an erroneous exercise of jurisdiction.

2. The question as to which of the parties should ultimately be charged with the receivership costs having been expressly postponed by the lower court, cannot be considered or determined on this appeal.

3. With that question deferred for future action, the "first instance" provision made for receivership expenses from the fund was justifiable and warranted.

4. The allowances made in the first three orders for receiver's compensation, traveling expense and counsel fees, being for official as contra-distinguished from administrative expense, are not subject to review on this appeal for the reason that such orders were each and all appealable, and the time for appeal had passed before the order was made from which this appeal was taken.

5. The purely administrative expense represented by the salaries of the manager and bookkeeper were expenses of the business and not of the receivership and were properly currently paid from current receipts. They may not even be properly included in taxable receivership costs.

6. Litigation expense and the receiver's official expense including compensation and counsel fees being the debts of the court growing out of the court's custody of the property, were properly paid in the "first instance" from the fund.

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Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

CLOSING BRIEF OF APPELLEES.

In their reply brief appellants have entirely ignored the single reviewable question involved in this appeal, namely, did the lower court err in making a "first instance" provision for the receiver's compensation and counsel fees out of the fund in his hands. The following excerpts from the memorandum opinion of the lower court which preceded and directed the order appealed from will show that the provision was purely temporary, and that it was the only matter passed upon by the lower court:

"There is no exception taken to the correctness or propriety of any particular item of the

receiver's account but the objection really is to the items of that account being charged or allowed against the fund administered, the contention being that they should under the circumstances of the case be charged to the plaintiff who procured the appointment of the receiver. But that question will more properly arise on a motion to tax the costs upon the entry of the final decree. * * * This being so, it (the court) has authority to provide for his (the receiver's) compensation either out of the fund administered, or at the hands of the party procuring his appointment. * * * Nor does it necessarily follow that because his appointment was erroneously made the expense and compensation may not be directed to be paid out of the fund coming into his hands. That depends upon the circumstances of the case. As suggested, however, the question does not properly arise at this stage of the proceedings. But that the court may direct the payment of the receiver's accounts out of the funds in his hands *in the first instance* (italics ours) there is likewise no question." (Trans. vol. II, pp. 501-503.)

After referring to the able and exceptionally efficient administration of the receiver the opinion concludes thus:

"Certainly the laborer is worthy of his hire. Who ultimately is to pay that hire may be reserved until it properly arises. The exceptions are overruled and an order may be drawn approving and confirming the report of the receiver and providing for the compensation of himself and his counsel; and that *for the present* ((italics ours) such compensation to be paid out of the balance of the fund left in his hands for the purpose." (Trans. vol. II, pp. 503, 504.)

The balance referred to was the amount retained by the receiver upon returning the property and fund to the corporation

“to satisfy any balance of commissions and expenses of the receivership, including attorney’s fees, which may be allowed him in his final account”

under order of court made on motion of R. T. Harding, solicitor for appellants. (Trans. vol. II, pp. 356-357.)

The order that followed and from which this appeal is prosecuted, approved and confirmed the fourth and final report and account of the receiver, directed that out of the fund the receiver pay himself \$2262.34 as compensation and a like amount to his counsel, and that he be discharged and his bondsmen exonerated. The order then concludes thus:

“It is further ordered that all other questions raised by defendants on this hearing be and they are hereby postponed for determination until the hearing on the final decree herein.” (Trans. vol. II, pp. 504, 506.)

Whatever shall be held in regard to the scope of this review, as to whether it includes only the items contained in the fourth and final report, or, as well, all items excepted to in the three prior reports, it stands admitted by appellants that all of the items excepted to represented reasonable charges for services actually rendered and expenses actually incurred.

Notwithstanding appellants’ exceptions wherein it was insisted that the items specified should be

charged against the complainants, and notwithstanding their assignment of error in that they were not so charged in and by the order appealed from, that question is not reviewable on this appeal for the reason that it was by the lower court expressly reserved for future consideration and determination. Apart from that question, the only objection urged against the order appealed from is that the receiver's compensation and counsel fees were directed to be paid in the "first instance" out of the balance in his hands provided for that express purpose. As above stated, that is the single reviewable question on this appeal.

On this sole issue appellants have advanced but one pertinent contention, namely, that the lower court was without jurisdiction to appoint the receiver, and that as a consequence the order was void and the receiver's possession of the property and fund no better than that of a trespasser, and that, therefore, the property and fund should be restored intact and without deduction on account of the expense of an administration that was without lawful warrant.

JURISDICTION.

It will be conceded that the lower court had jurisdiction of both the parties and the subject matter of the suit. The general jurisdiction thus obtained in an equitable action includes as a necessary incident to its effectual exercise the power to apply any

and all recognized provisional and auxiliary remedies. In 15 *Corpus Juris*, p. 810, sec. 108 it is said:

“A grant of jurisdiction implies the necessary and usual incidental powers essential to effectuate it, and every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice, within the scope of its jurisdiction, and the enforcement of its judgments and mandates. * * * A court’s power to apply a remedy being co-extensive with its jurisdiction over the subject matter; * * * So demands, matters, or questions ancillary or incidental to or growing out of the main action, and which also come within the above principles, may be taken cognizance of by the court and determined, for such jurisdiction is in aid of its authority over the principal matter.”

The appointment of a receiver is a recognized provisional or auxiliary remedy in an equity suit.

“The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it.”

34 *Cyc.* 17.

“The matter of the appointment of a receiver is the subject of equitable jurisdiction, to be exercised in proper cases in any cause of which the court, as a court of equity, has jurisdiction.”

34 *Cyc.* 101.

The power to appoint a receiver inheres in the court’s general jurisdiction of a cause. It exists independently of any appeal to it in a given cause.

It is a resident power as much when passive as when called into play. When invoked by an application for appointment it functions either favorably or unfavorably to the applicant. But the power is not born of the application; it is not called into being, as contended by appellants, by the presentation of a so-called "proper case". It is merely aroused to action by the case presented. Being thus appealed to it becomes an active discretion—the power of decision in play. To say that the power to decide depends upon the correctness of the decision is no more ridiculous than to say, as contended by appellants, that the jurisdiction to appoint a receiver depends upon appellate approval of the appointment.

"Jurisdiction of a question is the lawful power to enter upon the consideration of it, and to decide it. It is not limited to making correct decisions. It necessarily includes the power to decide an issue wrong as well as right."

Ex parte Moran (C. C. A., Eighth Cir.) 144 Fed. 594, 604.

"Jurisdiction is a matter of power, and covers wrong as well as right decisions."

Lamar v. U. S., 240 U. S. 60; 60 L. Ed. 526;

Fauntleroy v. Lum., 210 U. S. 230; 52 L. Ed. 1039;

Burnet v. Desmornes, y Alvarez, 226 U. S. 145; 57 L. Ed. 159.

"A court's jurisdiction is its authority to hear and determine a cause. Its decision in a particular case has nothing to do with its juris-

diction of the cause. Decision is a sequence of jurisdiction not its source."

Hazelwood Dock Co. v. Palmer, 228 Fed. 325, 326.

In *U. S. v. Ness* (C. C. A., Eighth Cir.) 230 Fed. 950, 953, it is said:

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to the question and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court to deal with the abstract question. It is not limited to making correct decisions. It empowers the court to determine every issue of law and fact within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong." (Citing)

Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 318; 8 C. C. A. 635;

Insley v. U. S., 150 U. S. 512; 14 Sup. Ct. 158; 37 L. Ed. 1163;

Cornett v. Williams, 20 Wall. 226; 22 L. Ed. 254;

Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552; 8 Sup. Ct. 217; 31 L. Ed. 202;

In re Sawyer, 124 U. S. 200, 221; 8 Sup. Ct. 482; 31 L. Ed. 402;

Skillern v. May's Ex'rs, 6 Cranch 267; 3 L. Ed. 220;

McCormick v. Sullivan, 10 Wheat 192; 6 L. Ed. 300;

King v. McAndrews, 111 Fed. 860, 863; 50 C. C. A. 29.

Appellants insist that the presence of a "proper case" is a necessary predicate of jurisdiction to appoint a receiver, but therein they fail to distinguish between jurisdiction and its exercise. The determination as to whether a "proper case" is presented implies a decision of the questions of law and fact involved and such decision represents the exercise of jurisdiction. Jurisdiction, on the other hand, is the authority to so decide.

In the instant case the lower court decided that a proper case was presented for the appointment of a receiver. That decision involved a finding that the facts were such as to warrant the application of the provisional remedy of receivership. As a result of a *de novo* review in this court, it was held that the lower court erred in its findings of fact. It was found below that the majority stockholders were acting in fraud of the rights of the minority and of the corporation. This court held that the evidence did not warrant that finding. Clearly the error found inhered in the exercise and not in the absence of jurisdiction. The essence of the reversal of the order appointing a receiver was the holding by this court that the lower court's determination of the matter was wrong, not that there was a lack of

power to make any determination as to the appointment of a receiver.

It being thus apparent that the lower court had jurisdiction or power to appoint the receiver, it follows, quite irrespective of whether it erred in so doing, that the order of appointment was not void and that the receiver's possession of the property and of the fund that accumulated in his hands was lawful.

As above stated, lack of jurisdiction to appoint the receiver is the only contention advanced by appellants in either their opening or their reply briefs tending to show lack of authority or lawful warrant for purely "first instance" provision from the fund for receivership costs, compensation and counsel fees. The only other contention of appellants is that a consideration of the equities of the case should require the taxation of all receivership costs to the complainants. That question is not here reviewable by reason of its postponement by the lower court, nor does the contention that all receivership costs should, in view of the equities of the case, be taxed to complainants, have any bearing on the question of the propriety of a purely "first instance" provision for such costs from the fund.

FIRST INSTANCE ALLOWANCE FROM FUND.

The receiver, being an officer of the court, his possession of the property and fund became the court's possession and the receiver's expenses in

connection with the administration of the fund became the liabilities of the court itself.

“A receiver appointed to preserve a fund or property *pendente lite*, derives his authority from the act of the court appointing him; the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled.”

34 *Cyc.* 185;

Quincy, etc. v. Humphreys, 145 U. S. 82; 36 L. Ed. 632;

Union Bank v. Kansas City Bank, 136 U. S. 223; 34 L. Ed. 34.

Property in the possession of a receiver is in *custodia legis*; the receiver's possession is the possession of the court for the benefit of the party ultimately entitled to it.

Atlantic Trust Co. v. Chapman, 208 U. S. 360; 52 L. Ed. 528;

Ex parte Tyler, 149 U. S. 164; 37 L. Ed. 689;

Thompson v. Phoenix Ins. Co., 136 U. S. 237; 34 L. Ed. 408;

Wiswall v. Sampson, 14 How. 52; 14 L. Ed. 322.

In the *Atlantic Trust Co. v. Chapman*, 208 U. S. 360; 52 L. Ed. 528, 533 it is said:

“It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by his appointment and the course and practice of the court. * * * When a court exercising juris-

diction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court. The court itself holds and administers the estate through the receiver as its officer."

At page 535 (L. Ed.) it is further said:

"A receiver as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters from time to time under the order of the court, are in a substantial sense, the contracts and engagements of the court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in possession of the court, and not the liabilities of the parties. They have no authority over him and cannot control his acts."

The general rule is that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are a charge upon and should be paid out of the fund or property in his hands, although the party procuring the appointment is ultimately unsuccessful.

Atlantic Trust Co. v. Chapman, 208 U. S. 360; 52 L. Ed. 528;

Clark v. Brown, 119 Fed. 130;

Elk Fork Oil Co. v. Foster, 99 Fed. 495;

Burden Central Sugar-Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810;

Ferguson v. Dent, 46 Fed. 88;

Blair v. St. Louis R. Co., 20 Fed. 351.

The same rule has been applied in the following cases as to receiver's counsel fees:

Penn. Life Ins. Co. v. Jacksonville R. Co.,
93 Fed. 60;

Sowles v. Nat. Union Bank, 82 Fed. 139;

Petersburg Sav. etc. Co. v. Dillatorre, 70
Fed. 643;

Louisville, etc. R. Co. v. Wilson, 138 U. S.
501; 34 L. Ed. 1023.

“The proper method of procedure is to have his (the receiver's) compensation fixed by the court, to be allowed out of the assets in his hands and the amount thus determined to be due him may be taxed as costs in the action.”

High on Receivers, (Fourth Ed.) Sec. 796.

This general rule of making the fund bear the court expense of the court's administration of the property is subject to certain exceptions. If the court was without jurisdiction to appoint the receiver in the first instance, the fund must be restored intact. Again if the complainant fails in the main action, and no benefit has accrued to the defendant from the receivership, especially where there is evidence of bad faith in procuring it, the costs of the receivership may be ultimately taxed to complainant. Also in cases where the complainant fails in the action, should it appear that the defendant has materially benefited by the receivership, in the ultimate taxation of receivership costs they are sometimes paid from the fund and sometimes apportioned between the parties.

But in none of the cases where the costs of the receivership are ultimately taxed in whole or in part to the complainant is it held that a "first instance" allowance from the fund may not properly be made in harmony with the recognized principle that receivership expenses are court liabilities arising out of the court's custody of the property. In all cases, however, the matter of ultimate taxation of receiver's compensation and expenses is governed by the universally recognized principle that such compensation and expense are part of the costs of the action, and, like other costs in an equitable proceeding are to be assessed or taxed in accordance with the principles of equity and on equitable grounds. They are none the less taxable costs because they are non-statutory and require judicial ascertainment.

2 *Tardy's Smith on Receivers*, pp. 1726, 1754.

But we have not here to consider the question as to what would be an equitable ultimate taxation of the receivership costs in this case inasmuch as that matter was by the order appealed from expressly deferred until the entry of the final decree. That the court may make a provisional allowance out of the fund without losing its power to place the burden ultimately on the party who ought to bear it, was held in

Cutter v. Pollock, 4 N. D. 205; 59 N. W. 1062;

50 Am. St. R. 644; 25 L. R. A. 377;

Nutter v. Brown, 58 W. V. 237; 52 S. E. 88;

1 L. R. A. (N. S.) 1083.

It is urged by appellants that the receivership being an independent matter severable from the action proper, upon its termination by the discharge of the receiver, it was obligatory upon the court to make a full and final disposition of the matter by taxing the receivership costs to one or the other of the parties. It would be a complete answer to say that the lower court in and by the order appealed from did not do so, but expressly deferred action as to that matter, and, that being so, the court's failure to act cannot be reached by this appeal. But no authority has been cited in support of the proposition and it is not made to appear other than by appellants' assertion that the court was under any obligation to so finally dispose of the matter of taxation of receivership costs at the time of ordering the receiver's discharge. On the other hand there are abundant authorities to the effect that the court has inherent power to place itself in a position upon relinquishing possession of the property to enforce its orders with respect to expenditures made in connection with the receivership.

34 *Cyc.* 480;

Joslyn v. Athens Coach etc. Co., 43 Minn. 534; 46 N. W. 77;

La Junta etc. Canal Co. v. Hess, 31 Colo. 1; 71 Pac. 415;

Knickerbocker v. Kindley etc. Co., 172 Ill. 535; 50 N. E. 330.

A condition at once impractical and unfair would result from a denial of the court's right to make

“first instance” provision from the fund for the receiver’s compensation and expense pending ultimate taxation of such amounts as costs in the case. It would follow of necessity in such case that the receiver would have to serve without compensation until the entry of the final decree and even then take his chance of being able to realize the amount due. Furthermore, as to expenses other than receiver’s compensation, due to strangers to the suit, pending final decree, the amounts would have to remain unpaid or be advanced by the receiver himself.

In the instant case should it be held that the “first instance” allowances made from the fund were not authorized, and that the order appealed from should, therefore, be reversed, the receiver would immediately be under obligation to restore to the fund the amounts so allowed him including not only his compensation, but that of his counsel and as well, over \$27,000 paid on account of litigation and administrative expenses. If it is appellants’ position that no such restitution should be made, then their objection to the order appealed from is simply and solely as to the failure of the lower court to finally tax the receivership costs to the complainants; a matter which clearly is not reviewable on this appeal in view of its express postponement until final decree.

SCOPE OF REVIEW.

There were four orders made covering receiver's compensation. They appear in the transcript as follows: the first at page 262 of Vol. I; the second at page 294 of Vol. II; the third at page 314 of Vol. II; and the fourth at page 504 of Vol. II.

These four orders were made in connection with the approval and allowance of the four reports and accounts filed by the receiver. The exceptions and objections filed by appellants to the receiver's fourth and final report include certain exceptions and objections to the first three orders made as to receiver's compensation. All four orders directed the allowances for compensation to be paid out of the fund in the receiver's hands. It is here contended by appellees that each of the first three orders that preceded the fourth and final order were appealable and therefore not reviewable on this appeal.

The first was made December 11, 1918, and covered the period from February 23, 1918 to December 31, 1918. The second was made January 6, 1920, and covered the full calendar year of 1919. The third was made December 4, 1920 and covered the full calendar year of 1920. The fourth was made September 29, 1921 and covered the period from January 1, 1921 to September 29, 1921, the date of the receiver's discharge. The time for

appeal from each of the first three orders had expired long before the date of the fourth order.

Each of the first three orders was for a definite specified period. Each amounted to an independent judicial determination as to what was a reasonable sum to be allowed and as to its payment from the fund. In the nature of things none of these orders were the subject of review by the trial court upon the consideration of the fourth and final report. They were each a final order covering a definite period of service. The amounts allowed had been paid from the fund as ordered, and so said orders had been fully executed. All three were closed incidents when the fourth and final report was filed. The mere fact that the court still retained jurisdiction of the parties and subject matter and of the receiver and the fund did not make them interlocutory in nature or detract from their full finality.

The authorities are unanimous in holding that an order fixing the receiver's compensation and directing its payment from funds in his hands is an order of such final character as to warrant an appeal therefrom by any party interested in the estate, since such an order withdraws the amount specified from the fund in the custody of the court and thereby affects the substantial rights of the parties.

2 *Tardy's Smith on Receivers*, p. 2155, sec. 807;

Ruggles v. Patton, 143 Fed. 312; 74 C. C. A. 450;

Penn Co. v. Philadelphia, 266 Fed. 1;
Edwards v. Western Land & Power Co., 27
 Cal. App. 724; 151 Pac. 16;
Forester v. Boston & Butte M. Con. Copper
Co., 30 Mont. 181; 76 Pac. 2;
Thompson v. Denton, 95 Oh. St. 333; 116 N.
 E. 452;
Kilpatrick v. Horton, 15 Wyo. 501; 89 P.
 1035;
Battery Park Bank v. Western Carolina Bank,
 126 N. C. 531; 36 S. E. 39;
Union Nat. Bank v. Mills, 103 Wis. 39; 79
 N. W. 20.

The amounts allowed and directed to be paid to the receiver from the fund as compensation for the calendar years 1918, 1919, 1920 in and by the first three orders were as follows:

First order for fractional year 1918	\$ 4,270.76
Second order for year 1919	5,000.00
Third order for year 1920	5,000.00
	<hr/>
	\$14,270.76

No exception is taken by appellants as to the reasonableness of these allowances, it being objected merely that they should not have been paid from the fund. If such orders were not final the receiver would face the alternative of serving without compensation up to the time of his discharge, or accept-

ing the periodic payments at the risk of ultimately being required to repay them. Neither alternative would be equitable in view of the nature of his office and his neutral position as between the parties at interest. Fairness to the court's custodian should require that parties deeming themselves prejudicially affected by such an order should press their objection by a timely appeal or be debarred from later challenge.

Such an order is held to be a final adjudication upon a collateral matter arising out of the action, and, therefore, appealable.

- 1 *Clark on Receivers*, p. 746, sec. 682;
- Grant v. Sup. Ct.*, 106 Cal. 324; 39 Pac. 604;
- Grant v. Los Angeles & Pac. R. Co.*, 116 Cal. 71;
- Capital City v. Anderson*, 138 Ga. 667; 75 S. E. 1040;
- Thompson v. Huron Lum. Co.*, 5 Wash. 531; 32 Pac. 536;
- People v. Brooklyn Bank*, 126 N. Y. Supp. 155;
- Burroughs v. Merrifield*, 243 Ill. 362; 90 N. E. 750;
- Hanover Ins. Co. v. Germania Ins. Co.*, 46 Hun. 308.

This rule manifestly applies equally to the receiver's personal expenses incurred in the discharge of his official duty. Items of this character included

in the first three reports to which exceptions were taken are as follows:

First Report—

Premium on receiver's bond	\$ 50.00
Traveling expenses (vol. II, p. 362)	579.25
	<hr/>
	\$629.25

Second Report—

Premium on receiver's bond	\$ 50.00
Traveling expenses (vol. II, p. 368)	546.56
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	\$596.56

Third Report—

Premium on receiver's bond (vol. II, p. 373)	50.00
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Total	<hr/>	\$1275.81
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This amount, together with the \$14,270.76 allowed as compensation in the first three orders makes \$15,546.57 of the items excepted to by appellants, which are clearly not reviewable on this appeal by reason of the appealability of the first three orders. Whatever may be said or held as to purely administrative expenses of the receivership such as necessarily inhere in the operation of the business, it is believed that no case can be found holding that orders directing the payment of receiver's compensation from the fund are not appealable.

There is every reason why the same rule of finality and appealability should be applied to orders allowing receiver's counsel fees and directing their payment from the fund. In the case of *Heinze v. Butte & Boston, etc. Min. Co.*, 129 Fed.

337; 64 C. C. A. 15, counsel fees were joined with ordinary administrative expenses of the receivership and the order covering both was held to be interlocutory; but there would seem to be the best of reasons for distinguishing receiver's counsel fees from expenses necessarily incident to the management and operation of the property entrusted to the receiver. They are intimately related to allowances for receiver's compensation. It is rarely the case that a receiver is an attorney, yet it is of the highest importance that in all his dealings with the trust estate, he should safeguard the legal rights of all parties to the controversy. To that end it is imperative that he be properly advised as to his powers and duties.

There are cogent reasons for differentiating receiver's charges that are purely *official* from those that are purely *administrative*. Official charges arise out of the office; administrative charges relate to the property itself, as an indispensable expense of operation. The latter are a natural and necessary lien upon the fund and their payment cannot be said to amount to a *deduction from the fund*; the former being over and above the expense that would have been necessary but for the receivership when paid from the fund are a clear *deduction from the fund*.

In *Ruggles v. Patton*, 143 Fed. 312, 313, it is said:

“The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to

whether the receivership is thereafter continued, but in the nature and character of the order itself. When Mr. Patton was ordered to pay to himself out of the funds in his hands as custodian for the court, the sum of \$20,000 for his service for 1904, that sum of money was just as absolutely withdrawn from the custody of the court as if he had been ordered to pay it to a third person. The fact that he was then the court's receiver, and that he continued to be the court's receiver, gave the court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect, than it could exercise over any other party obtaining funds through an order of the court. * * * We think that the direction that the receiver should pay to himself \$20,000 for a specific service already rendered was a complete withdrawal of that part of the funds from the court's possession."

Considered in the light of their extra-administrative character it would seem clear that the receiver's counsel fees paid from the fund would be as much *a deduction from the fund*, within the reasoning of the Ruggles case, as the receiver's compensation itself, and in view of the fact that the cases are uniform in holding that an order directing receiver's compensation paid out of the fund is appealable, it would seem to follow that the same rule should apply to orders relating to receiver's counsel fees.

The *Heinze* case involved an order covering both purely administrative expenses and receiver's counsel fees. There was no attempt in that case to dis-

tinguish the two and the mixed order appealed from was held to be interlocutory. That case seems to stand alone in so holding as to counsel fees. Under the reasoning of the later cases which recognize that extra-administrative charges paid from the fund represent *a deduction from the fund*, whereas purely administrative charges cannot be said to be a deduction, it would seem necessarily to follow that an order for the payment of receiver's counsel fees from the fund was of such final character as to give to the parties interested in the fund the right of appeal.

If it should be said and held that the first three orders allowing counsel fees and directing payment from the fund were appealable then they are not reviewable on this appeal. The first three orders as to counsel fees were as follows:

December 11, 1918 for fractional year 1918	\$4,270.76
January 6, 1920 for year 1919	5,000.00
December 4, 1920 for year 1920	5,000.00
	<hr/>
	\$14,270.76

The items excepted to, but not reviewable on this appeal because covered by appealable orders made prior to the order appealed from then aggregate:

Receiver's compensation	\$14,270.76
Receiver's traveling and bond expenses	1,275.81
Receiver's counsel fees	14,270.76
	<hr/>
Total	\$29,817.33

This leaves as reviewable items among those excepted to by appellants the following:

First Report—

F. C. Handy, manager at mine, 10 months @ \$450 per month	\$ 4,500.00
Receiver's bookkeeper at various rates, 10 months	988.33
Court costs	70.00

\$ 5,558.33

Second Report—

F. C. Handy	\$5,400.00
Bookkeeper	1,225.00
Haskins & Sells' audit	3,679.40
Fees of Master in Chancery	2,500.00

\$12,804.40

Third Report—

F. C. Handy	\$ 5,400.00
Bookkeeper	1,500.00

\$ 6,900.00

Fourth Report—

F. C. Handy	\$2,100.00
Bookkeeper	500.00
Receiver's compensation	2,262.34
Receiver's counsel fees	2,262.34

Total \$ 7,124.68

Total \$32,387.41

Classified and consolidated the reviewable items excepted to are:

Receiver's Administrative Expense—

F. C. Handy	\$17,400.00
Bookeeper	4,213.33

\$21,613.33

Litigation Expense—

Court costs	\$ 70.00
Expense of audit	3,679.40
Master fees	2,500.00

\$ 6,249.40

Receiver's Official Expense—

Receiver's compensation	\$ 2,262.34
Receiver's counsel fees	2,262.34

\$ 4,524.68

Total	\$32,387.41
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As to the first classification, namely, receiver's administrative expense: A manager at the mine was as necessary under the receiver as before. The salary allowed for Mr. Handy as manager (\$450 per month) was the same as previously paid by the corporation to E. M. Gleim as superintendent. The bookkeeper in San Francisco also was necessary to the management and operation of the property and business. The company had employed one before the receivership. The receiver retained the same man until he became incapacitated by illness.

It is impossible to see why these allowances for manager and bookkeeper, both admittedly necessary to the operation of the property and business, were any more objectionable than the wages of the miners or any other necessary element of operating expense.

In the instant case the San Francisco administrative expense at the time of the appointment of the

receiver and for a long period prior thereto was (Vol. I, pp. 123-125):

B. S. Noyes, President	\$125 a month
W. S. Noyes, Vice Pres. & Gen. Man.	375 " "
J. W. F. Peat, Secy.	270 " "
	<hr/>
	\$770

Under the receivership the corresponding San Francisco expenses in the 39 months of receivership were (Vol. II, pp. 506, 527, 528):

W. B. Maling, Receiver	\$16,533.10
F. R. Wehe, Attorney	16,533.10
Bookkeeper	4,213.33
	<hr/>
	\$37,279.53

an average of \$955.88 per month. This is an average increase of only \$185.88 a month in San Francisco, or \$7249.32 during the entire receivership. The only further excess in costs of the receiver's administration was in the retaining of E. M. Gleim, together with F. C. Handy, for the first nine months, at \$450 a month, or \$4050. (Vol. I, p. 232.) For the remainder of the receivership, Mr. Handy's salary of \$450 merely offset the same sum that had been paid Gleim by the defendants prior to the receivership.

This total of \$11,299.32 is all that can possibly be construed as excess in costs of the receivership over the prior management; and this excess is much more than made up to the corporation by savings effected by the efficient management under the receiver,

which savings in the year 1918 alone were \$14,038.70 (Vol. I, 269), representing the difference between the receiver's operating cost and that of the prior corporate management.

No objection is raised to the fact that the receiver operated the mine, and the fact that such operation for three years resulted in the accumulation of over \$500,000 net profits sufficiently indicates the wisdom of that course. If the mine was to be operated and the employment of a manager and bookkeeper were necessary to such operations, their payment had to be provided for. The receiver paid them currently out of the fund and reported such payments, and the reports were approved. How else were they to be paid?

It is insisted by appellees that this classification of the receiver's expense of operation is not even a proper item to be included in the ultimate taxation of receivership costs to the parties. It was a legitimate expense of the business itself as contra-distinguished from the receivership.

The next classification, namely litigation expense, includes court costs, expense of audit and master's fees. The Haskins & Sells' audit covers an examination of the books and records of the corporation for a number of years, and was made with the consent and on the stipulation of the attorneys for the respective parties. The purpose of the audit primarily was to discover the true situation as bearing upon certain allegations of the complaint relative to the mismanagement of the company's affairs.

A secondary purpose served by certain elements of the audits covered by the charge was the assistance to the receiver in the preparation of annual income tax returns. (Vol. I, pp. 181, 281.) The item of \$2500 for fees of the Master in Chancery covered services rendered by the Master under an order of reference made by the court of certain issues left open by the interlocutory decree. The appeal from the interlocutory decree did not operate by way of supersedeas, and the inquiry under the reference continued during the pendency of the appeal. The fees charged arose in connection with that inquiry.

All three of the elements of litigation expense, including court costs, cost of audit and Master's fees, are, of course, in their nature proper taxable costs in the case and when the final decree comes to be entered, they will doubtless be included in such taxation. Here, as well as in respect to the receiver's compensation and counsel fees, the allowance from the fund was purely temporary and in aid of the advance of the litigation to its conclusion. At most it amounts to a mere advance from the fund in the court's custody to cover charges that would in the nature of things be included in the final taxation of costs. Furthermore, in so far as the audit was necessary to the receiver's administration, it became an element of official and non-administrative expense which, under the contention above advanced was appealable, and therefore, not here reviewable. As to the \$2500 for Master's fees, appellants, at page 104 of their reply brief, concede

that the order directing its payment from the fund was appealable; therefore, it is not here reviewable.

The only other items excepted to within the scope of review are the receiver's compensation and counsel fees for the fractional year 1921, covered by the order approving and confirming the fourth and final report. The propriety of the "first instance" payment of these items from the fund has been already fully discussed.

EQUITABLE CONSIDERATIONS.

We have already touched on this subject. (pp. 32, 34, first brief for appellees.) This suit was brought by two minority stockholders on behalf of the corporation against the majority who dominated its Board of Directors, and who naturally had refused to bring a suit against themselves. As a result of the suit the corporation secures section 5, a valuable piece of mining ground, the title to which stood in the name of W. S. Noyes, the principal defendant. A further result of the suit was the cancellation of a lease given by Noyes to the corporation, by which cancellation the company benefited by receiving *all* instead of a part of the net profits from section 5, since the decree of the trial court of February 18, 1918, and affirmed by this court. The company had not declared a dividend since 1905, but by reason of the suit and the receivership, \$638,000 net profits accumulated in a little over three years, and upon the discharge of the

receiver was turned over to the corporation. Throughout the litigation both the individual defendants and, by reason of their control, the company itself denied under oath that the corporation had any right to section 5, or the cancellation of the lease, and persistently objected to the granting of the relief prayed, or any relief to the corporation. This phase of the matter has already been discussed in the brief for appellees (pp. 25-27), and in the receiver's printed argument (pp. 4-8).

It is interesting to note the position taken by the appellants in their briefs on the former appeal in which we find their exceptions noted numbered XLIII, XLIV and XLV, in which they aver that the court erred in finding that section 5 belonged to the Presidio Mining Company, or that Noyes was a trustee. (Opening brief for appellants on appeal, No. 3253, pages 42, 54.) Also in their exceptions L and XLIX appellants assert that the court erred in ordering section 5 transferred to the Presidio Mining Company. (Same brief, pages 45, 57.) Also exceptions LX and LIX appellants aver that the court erred in making a decree in favor of plaintiffs and against defendants. (Same brief, pages 48, 60.)

Again in their argument it is asserted that Noyes claimed section 5 as his individual property; that it was the main matter for consideration in the case; that herein lies the heart of this case; that Noyes had a right to make the best bargain he could in contracting with the corporation and to insist that

the terms of the bargain should be lived up to; that he was dealing at arms length with it; that the corporation was without any right whatsoever in section 5; that it had no right, title, estate, interest or claim in section 5. (See same brief, pages 70, 71, 73, 206, 207, 210, 242, 313 and 314.)

Again in their closing brief on the original appeal, No. 3253, it is urged at page 199 thereof, that a decree of this Circuit Court of Appeals be entered, reversing the decree of the trial court.

Again in appellants' brief on rehearing, No. 3253, page 31, we find the assertion that the bill of complaint must be dismissed; page 43, the appeal should be dismissed on grounds of res judicata and at page 317 we find the following:

“We submit that the decrees appealed from should be reversed.”

This consistent attitude of all the appellants controlling the corporation, indicates that the desire to retain section 5 for W. S. Noyes cannot be reconciled with their present statement that Noyes had always offered it to the corporation and was ready to turn the said section over to the company on the payment of its purchase price.

It is contended by the appellants that the suit was unnecessary in view of this court's findings that W. S. Noyes at all times *desired* that the corporation should have section 5. It might be pointed out in reply that he and his brother at all times dominated the Board of Directors and had he so *desired*, the means of realizing that desire was always at hand.

The fact that the transfer *was not* made to the corporation, nor any deed by Noyes ever tendered, sufficiently indicates that the desire was not controlling, to say the least, and his resistance to the suit and the according of the relief awarded is conclusive evidence that the suit was necessary. Appellants insist that because of the modification on appeal of the interlocutory decree of the lower court, the entire cost burden should be placed upon the complainants, notwithstanding the fact that the modifying decree of this court affirmed the trial court's decree awarding Section 5 to the corporation. That this court did not so regard the underlying equities of the case is manifest from the concluding clause of its opinion on rehearing, which is

“The plaintiffs and defendants will each pay their own costs in this court.”

In their reply brief on this appeal, appellants savagely attack the good faith of the plaintiffs in bringing the suit, and particularly in seeking the appointment of the receiver. Yet it is nowhere made to appear that the plaintiffs sought or could have obtained any advantage by the suit or the receivership, save as stockholders of the corporation. And anything which they as stockholders might gain by the suit would be equally advantageous to all other stockholders, including the majority stockholders named as individual defendants. Appellants assert that the equities of the case require that not only the purely official expense of the receivership, but as well, over \$20,000 of purely administrative ex-

pense, represented by the salaries of the manager and bookkeeper, should be taxed against the two minority stockholders, who at their own risk and expense initiated this suit which has resulted in the recovery of Section 5 for the corporation. This appeal appears to be more of an effort on the part of appellants to obtain such a judgment for costs against the appellees, as might result in freezing them out of the corporation through execution and levy on appellees' stockholdings in this company, and thereby secure such an absolute control of the corporate stockholdings that no minority representation can ever be obtained on the Board of Directors at any time in the future, rather than a desire to seek in good faith a recovery on behalf of the corporation.

The complainants believed and so alleged, that the individual defendants had been guilty of gross fraud upon the corporation. The lower court and one member of this court found to that effect. Two members of this court disagreed as to that finding. Surely the accusation could not have been so utterly unfounded as to warrant the imputation by appellants of bad faith to the complainants. Moreover, it stands admitted that Osborn was an embezzler; that the Noyes Brothers used their knowledge of the embezzlement to force him to surrender his stock as the price of their continued concealment of the crime. (Record No. 3253, pp. 271, 754, 819; Record No. 3896, pp. 40, 41, 43, 58, 59, 60.) Having in this manner secured control of the corporation

they used that control to serve their own individual ends and interests. Notwithstanding these facts, these appellants, including the embezzler, now seek to penalize the complainants.

With these admissions in the record, it ill becomes appellants to accuse the complainants of bad faith in instituting an action so largely beneficial to the corporation in its result, and in connection with which they could in no wise hope to profit save in common with all other stockholders, the appellants themselves included.

Appellants object to the statement that the corporation was benefited by the receivership and insist that the half million accumulation of net profits in the receiver's hands resulted from the operation of the Pittman Act, whereby the price of silver was appreciated. The statement also is made "that the cash resources of the company increased, not because of this receivership, but in spite of it." (Reply brief for Appellants, page 35.) In their argument, however, we find no mention of the fact that the receiver increased wages during the first year of his receivership, which amounted to \$1727.50 per month. (Record No. 3896, Vol. I, pp. 230, 257, 260.) During the second year of the receivership a second wage increase was granted, amounting to between \$1500 and \$2000 per month. (Same record, p. 288.) This was for mine and mill employees' wage increase alone, and does not include wartime increased cost of materials and supplies, consisting of an advance of from 100 to 200

per cent over pre-war time prices. Again by referring to the tabulation of monthly costs of operation (same record, pp. 266-269) we find that during the first year's operation by the receiver his said operations during this one year alone were \$14,038.70 less than the operating costs of the corporation by the appellants for the preceding year, and that too, notwithstanding the increased cost of labor and supplies. From all of which it would appear that the profit realized by the receiver resulted in large part from the greater efficiency, economy and honesty of his management, as compared with that which preceded it. During this one year this saving was greater than the difference of \$11,299.32, which sum comprehends the entire difference between the receivership expense for three and one-quarter years, and the regular operating expense under the management of the displaced appellants. In addition to these figures we also refer to the tabulation of \$42,620.33 interest earned on invested profits realized during the receivership, as indicated on page 30, brief for appellees.

Appellants' criticism on pages 1 to 4 of their reply brief, relative to the "re-entry" of Colonel Carl A. Martin is eminently unfair. The reading of the petition of the minority stockholders (Record 3253, Vol. V, pp. 1491-1511) clearly explains the so-called "re-entry" of Colonel Martin. The petition alleges (page 1494):

"Reading the opinion he finds that he is not a party to the action. Reading the record he

finds that he is. He therefore joins in this petition for the purpose of again becoming a party to the action, if he ever was, or for the purpose of becoming a party for the first time, if he never has been a party."

Said petition states the facts concerning the minority shareholders' active interest in this litigation, and that they had at all times supported the action of complainants, Overton and Martin; that said Overton holds the proxies of the above named stockholders to be used for his election as a director of the company (pp. 1497-1499); that they have contributed \$15,000 to a fund to apply on the expense of the litigation. (pp. 1501, 1502.) These facts conclusively prove the interest of the majority of the minority stockholders and their desire to support the actions of the complainants below and appellees herein. No decision on said petition was ever rendered by this court, as we have pointed out on page 1 of our opening brief.*

Dated, San Francisco,

January 20, 1923.

Respectfully submitted,

WILLIAM DENMAN,

WM. F. ROSE,

Solicitors for Appellees.

HORATIO ALLING,

Of Counsel.

*Instead of "New Trans." 1491-1511, the above reference should have been No. 3253, Vol. V, pages 1491-1511.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

PRESIDIO MINING COMPANY (a Corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT, and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

PRINTED ARGUMENT FOR RECEIVER.

(Filed by Leave of Court)

FILED

NOV 14 1922

F. D. MONCKTON,
CLERK

FRANK R. WEHE,
Attorney for Receiver.



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Argument on Behalf of Receiver.

By leave of this Court first obtained, the following is submitted on behalf of the Receiver—authority for this order permitting the appearance of the Receiver being found in the case of *Hovey vs. McDonald*, 109 U. S. 150 (27 L. Ed. 888).

Notwithstanding the indifferent attitude which a receiver during his incumbency of the office should maintain toward the parties to the action, still inasmuch as defendants in their brief do not confine their argument alone to the controversy between themselves and appellees, but seem to argue that the

Receiver was a trespasser, and should have returned the property in his hands at the close of the receivership without deduction of the compensation of himself and the fees of his attorney, and certain other items (see Appellants' Opening Brief, p. 10), it seems to be necessary for the Receiver to appear and make a showing.

The Receiver was appointed on the 20th day of February, 1918 (Orig. Tr., Vol. II, pp. 437-441), following a stipulation by the parties agreeing that Mr. Maling should be appointed, subject, however, to the reservation by defendants that the stipulation should not be construed to be any waiver, qualification, limitation or restriction upon their *appeal* from the order. (Same Record, p. 436.)

Attention is called to appellants' criticism of the Receiver to be implied from the argument of their counsel on pages 58 and 59 of their Opening Brief. Surely the Receiver, under the circumstances of this case, was not called upon, at his peril, to petition the lower Court for permission to resign, particularly in the face of the fact that notwithstanding this Court announced a decision reversing the order on October 27, 1919, appellants made no move to have the Receiver return the property until their motion made when they presented the Mandate of this Court on May 6, 1921 (This Record, Vol. II, p. 517), at which time the lower Court ordered the Receiver to deliver the property to the defendants.

It is true that the Receiver could have resigned, as suggested by appellants' counsel, and thus have abandoned the trust, or could have exacted the in-

demnity suggested; but defendants did not require an indemnity from plaintiff when the Receiver was appointed, yet there was at the time of the appointment ample authority for the imposition of such terms, if requested by a defendant.

See *Atlantic Trust Co. vs. Chapman*, 208 U. S., p. 360.

Surely, when a receiver is appointed, as in this case, where, outside of objections made by the defendants, seemingly more for the purpose of preserving a record than as a serious opposition to the possession of the Receiver, and where without motion to discharge him he is permitted to remain in possession until the final determination of the appeal, it may be assumed that he was not to be considered as a trespasser, and particularly so in view of the fact that on the whole case both the lower Court and this Court deemed it equitable that complainants should have substantial relief.

The theory of the Receiver on this argument is that following the action of the Supreme Court in the case of *Palmer vs. State of Texas*, 212 U. S. 118-132 (53 L. Ed. 455), if it appears to this Court that justice will be done in this case by allowing the items to the Receiver which appellants claim should be charged against him, to be paid out of the fund, that such course will be followed by this Court notwithstanding the reversal of the lower Court's order appointing the Receiver.

In so far as the Receiver's positions are concerned the facts will appear to be about as follows:

On the 20th day of February, 1918, the date of the appointment of the Receiver, the action had been tried in the lower court upon pleadings in which the minority stockholders, as complainants, charged that on certain equitable grounds the Presidio Mining Company was the beneficial owner of Section 5 and of all the profits from it, and that it was entitled in law and equity to have transferred to it the legal title (See Old Record, Vol. I, p. 73).

The defendants all appeared by the same solicitors and the answer of the Presidio Mining Company, verified by defendant B. S. Noyes, denied that it was the equitable owner of section 5, or that it was in law or in equity entitled to have transferred to it the legal title to Section 5. (Old Record, Vol. I, p. 133.) W. S. Noyes in a separate answer (Old Record, Vol. I, p. 198) makes the same denials.

Both answers pray that complainants take nothing by their amended bill of complaint.

At the trial the lower Court, by Van Fleet, Judge, found that the main matter for consideration in the case was the acquisition in the name of Wm. S. Noyes of Section 5, and on the conclusion of the trial decreed that Wm. S. Noyes should transfer Section 5 to the Presidio Mining Company by preparing deed, etc., and appointed the Receiver.

(NOTE.—In passing it is not out of place to state that the Presidio Mining Company owned the ground adjoining Section 5, and that this ground with its appurtenant reduction works—an expensive plant—constituted a complete

working mine; that Section 5 could be worked through the Presidio workings, its ores reduced in the Presidio Plant, and that the Presidio Mining Company was therefore the logical purchaser of Section 5, which had no appurtenant reduction works of any kind.)

Appellants then appealed from the order appointing the Receiver and assigned as error the judgment of the lower Court in finding and decreeing that the Presidio Mining Company was the lawful and equitable owner of Section 5, and also assigned as error the order of the Court that within thirty days from the date of the final decree Wm. S. Noyes should transfer Section 5 to the Presidio Mining Company by proper deed, etc. (See Old Record, Vol. IV, Exception XLIV, p. 1165, and Exception XLIX, pp. 1167, 1168.)

At the hearing on the appeal to this Court the order of the lower Court appointing the Receiver was reversed; but that part of the interlocutory decree of the lower Court providing that Section 5 should be transferred to the Presidio Mining Company was affirmed, although apparently upon a different ground—that is to say, while the lower Court arrived at its conclusion on the theory of a resultant trust, this Court adopted the theory of specific performance in that it was equitable under all of the circumstances of the case that the Presidio Mining Company should be the owner of Section 5, the Court working out a promise to convey from a willingness to convey, and the attendant circumstances.

While the grounds of the two Courts in form are not identical, in essence they are. See language of this Court in prevailing opinion on rehearing, emphasis on parts to save comment:

“In view of *all the circumstances*, in the *interest of what appeared to be the substantial rights of the parties* and an *equitable and economical disposition of the controversy*, we treated the action as in the nature of a notice for the specific performance of an agreement to sell Section 5, with a notice to terminate the lease of November 19, 1913, in accordance with its terms and an accounting that would provide for the conveyance by William S. Noyes of Section 5 to the Presidio Mining Company upon the payment to him of the purchase price * * * in accordance with his repeated offer.” (This case, 270 Fed. 405.)

This was said after the “case was tried *de novo* in this court” (p. 389). Therefore, notwithstanding the fact that as the pleadings stood the Presidio Mining Company and Mr. Noyes both denied that the Presidio Mining Company had any right to the transfer to it of Section 5, it is apparent that this Court, on *the whole case*, following the judgment and opinion of the lower Court upon the same case, found that it was equitable that William S. Noyes should convey Section 5 to the Presidio Mining Company; and the only substantial dispute between the lower Court and this Court upon the case was that this Court held that, under the circumstances of the case, there was no necessity for a receiver;

and it is apparent from the opinion that this lack of necessity was to some extent, at least, justified in the mind of this Court by the fact that it appeared to the Court from the *Testimony* of Mr. Noyes, as appears by the excerpt from the opinion on page 45 of appellant's brief, that he did not refuse to convey and that he was willing to convey upon the payment of the purchase price. "*This,*" say the Court, "deprived equity of its jurisdiction to declare Noyes' relation to the title fraudulent."

But it will be noted that this Court evidently having in mind what the situation of the Presidio Mining Company would be in case a dismissal of the action had been directed, and which the appellants on the appeal and in the lower Court insisted should have been done, did not direct a dismissal but entered a judgment compelling the conveyance of Section 5, evidently for the reason that had the action been dismissed, the answer of the Presidio Mining Company denying its right to have Section 5 transferred to it would probably have created an estoppel against it.

It is therefore apparent that both the lower Court and this Court were in accord upon the principal object of the amended bill. Complainants, as minority stockholders, were seeking a decree on the theory that Noyes was the Trustee of the company and that as such he was bound to transfer Section 5 to the company. This the lower Court upheld, and pending the accounting and transfer of the property appointed a Receiver. This Court, however, took another path toward the same result,—

that is to say, it found that Noyes had, in effect, promised to convey and was willing to convey, and was not, therefore, acting fraudulently; but it also decreed the transfer, and upon the premise that Noyes was willing to transfer, and conclusions inferred from other facts in evidence, held, in effect, that there was no necessity for the Receiver; so that the difference between the two Courts was one of logic with the subject of jurisdiction unquestioned. Both Courts exercised equitable jurisdiction, in that both Courts decreed the transfer, and both, in the face of a denial in the answers of the defendants that the Presidio Mining Company was entitled to the transfer. So that clearly the reversal of the lower Court was based only upon a difference of opinion between the two Courts as to what conclusion should be drawn from the evidence in the case; but on the whole case the substantive part of the judgment of the lower Court was affirmed. Therefore, it is submitted that the Receiver was in no sense a trespasser, in that the lower Court in appointing him acted within its jurisdiction, and that it is just and equitable that the expenses of the receivership, including the compensation of himself and his attorney, should in the first instance, at least, be a charge upon the fund in the Court's hands at the time of the different allowances.

The Receiver himself, of course, took the property of the Presidio Mining Company into his charge by order of the lower Court, and when a Court, exercising jurisdiction in equity, appoints a receiver of

the property of a corporation "the Court assumes the administration of the estate" and "the contracts he [the Receiver] makes, and the engagements into which he enters from time to time under the order of the Court are, in a substantial sense, the contracts and engagements of the Court. The liabilities which he incurs are the liabilities chargeable upon the property under the control and in the possession of the Court and not liabilities of the parties."

Atlantic Trust Co. vs. Chapman, 208 U. S. 360.

In the case of People vs. Oriental Bank, 114 N. Y. Supp. 440, the Court say:

"It cannot be said as matter of law that receivers are entitled to no compensation because the order appointing was vacated. That vacation did not proceed on the ground that the Court was without jurisdiction, but upon the ground that it was improvidently exercised."

In the case of Sullivan Timber Co. vs. Black (an Alabama case), 48 So. Rep. 870, decided in 1909, Mr. Justice Mayfield writing the opinion, this question of the right of a receiver to compensation out of the fund after a reversal of the order is fully discussed and the authorities examined, and the Court say:

"Compensation should not be denied a receiver because the Court had no power to appoint if he was in fact appointed in a legal manner and has in good faith discharged the duties of such receiver. The Court would protect him while acting under the orders of the Court and may award compensation out of the

estate or property entrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed and the bill under which he is appointed is dismissed."

As to the question of good faith of the Receiver here, that fact was not questioned at any of the hearings.

In the case of *Palmer vs. Texas* (212 U. S. 118), it appeared that the State of Texas brought suit in the State Court to forfeit a permit of the Waters-Pierce Oil Company to do business in that state and to recover all penalties for violation of the Texas anti-trust statutes. Verdict and judgment was rendered in favor of the State and against the company for over a million six hundred thousand dollars. Under the State law the State then had a lien on all of the property of the defendant to secure the judgment, which the property was insufficient to pay. Upon the rendition of the judgment, on petition of the State, a receiver was appointed to manage the property, and there was also an injunction that the property of the company should not be removed from the State. The defendant company appealed to the Supreme Court of the State, gave bonds on appeal, including a supersedeas, in a sum of double the amount of the judgment.

After these proceedings by the State, and before the State's receiver took possession of the property, one Palmer, a stockholder of the corporation, brought suit in the then United States Circuit

Court against the Pierce-Waters Company, reciting in his bill all of these proceedings by the State, and alleging that the laws of the State did not permit the penalties, etc., making a strong case in equity if under the circumstances the Circuit Court had had the right to proceed in the case; also praying for the appointment of a receiver. The defendant company confessed the bill. A receiver was appointed by the Court, who took possession of all of the property and business of the defendant company.

In addition to the equitable grounds stated in the complaint, jurisdiction to appoint the receiver in the Circuit Court was based upon the ground that the supersedeas bond had caused the State Court to lose its exclusive jurisdiction.

On application of the State's receiver to the State Court, that Court ordered its receiver by suits, etc., to assert the State's exclusive jurisdiction.

The State's Receiver then moved in the Circuit Court to vacate the appointment of the Federal receiver. Thus it is seen that the State by its Receiver became an active party to the action between the defendant company and its stockholders. The motion was denied by the Circuit Court. An appeal was then taken by the State and its Receiver to the United States Circuit Court of Appeals for that district. That Court reversed the order of the Circuit Court and vacated and discharged the receiver on the ground that the jurisdiction had first attached in the State Court, and that the

supersedeas bond did not suspend the powers of the State's receiver; that the State receiver was entitled to the possession of the property; and that the Circuit Court should not have appointed a receiver in the action; holding squarely that the jurisdiction of the State Court, having first attached, was exclusive.

The Appellate Court then made the following order:

“The interlocutory order appointing a receiver is reversed and vacated and the case remanded for further proceedings not inconsistent with the opinion of this Court, and with instructions to discharge Chester B. Dorchester as receiver and to tax all the costs of the receivership against Bradley W. Palmer, the complainant.”

See *State of Texas vs. Palmer*, 158 Fed. 705.

The case was then taken by Palmer to the Supreme Court of the United States for review on certiorari. That Court, after a full discussion of the case, sustained the decision of the Circuit Court of Appeals as to the question of jurisdiction and the effect of the supersedeas bond, and conclude as follows:

“Upon the whole case we are of opinion that the Courts of Texas had not lost the jurisdiction which they had acquired by the appointment of the receiver, and that the Federal Court ought not to have appointed a receiver to take possession of the property. We think the Circuit Court of Appeals was right in re-

versing the order of the Circuit Court appointing the Receiver”;

and say:

“In that Court the costs of the receivership were assessed against Palmer, the original complainant. The receivership has gone on pending the proceedings upon appeal, and we are of opinion that *justice will be done* if the costs of the receivership are *paid out of the fund realized in the Federal Court*, and it is so ordered. Otherwise the judgment of the Circuit Court of Appeals is affirmed.” (Italics added.)

The above case is on all-fours with this case as to the principle involved, even going further than the rule of each of the other cases, for the reason that it appears that the then Circuit Court appointed a receiver under circumstances where both the Circuit Court of Appeals and the Supreme Court decided that practically the Court had no jurisdiction to appoint. Of course this was not true fundamentally because the jurisdiction of both the State Courts and the Circuit Court were co-ordinate over the case, but for all practical purposes inasmuch as the State's jurisdiction had first attached, the jurisdiction of the Circuit Court was in abeyance by reason of the comity existing between the Courts (see 7 R. C. L., p. 1068, sec. 106, subject Courts), and it will be noticed that the Supreme Court orders the receivership costs paid “out of the fund,” which of course would deplete the total of the property which was already in-

sufficient to pay the State's judgment, and would compel the State to have recourse on the superseas bond.

On another theory the Receiver must prevail in this matter, at least, to the extent of the allowances prior to the order appealed from, because each of the prior orders was a final order not appealed from; and in addition, a large proportion—exceeding \$25,000—of the items objected to were actually in some instances and in effect in others, consented to by the appellants.

The facts on these questions are as follows:

The first report and account of the Receiver was rendered on the 2d day of November, 1918 (This Record, Vol. I, p. 209), and was a full report and account from the day of his appointment and taking over the property to and including the 23d day of October, 1918.

On the coming in of this report and one supplemental thereto, and in order to have the compensation of the receiver and his attorney treated as *deductions from the net income of the receivership during the fiscal year*, the parties (the defendants subject to certain objections inserted in the stipulation) stipulated that the sum of \$4,270.76 was a reasonable sum to be allowed the Receiver and a like sum to be allowed his attorney from the 23d day of February, 1918, to the 31st day of December, 1918 (the proportionate amount at the rate of \$5,000 per year each); and it was further stipulated that any Judge of the lower Court could make an order to that effect, and that there-

upon the Receiver might draw from the funds then in his hands the said sums and pay the same to himself and his said attorney. (See pp. 262-264, inc.)

This stipulation was dated the 11th day of December, 1918, and on the same day a Judge of the lower court made the order as stipulated and the same was filed (see p. 264).

The second report and account of the Receiver was filed on the 10th day of December, 1919. (This Record, Vol. I, pp. 275-289.) This account covered the period from October 31st, 1918, to and including the October 31st, 1919. To this account defendants filed objections on December 22d, 1919. (This Record, Vol. I, p. 289, to Vol. II, p. 293, inc.)

On the 6th day of January, 1920, this second report and account of the Receiver and allowance of compensation to himself and his attorney was confirmed. (This record, Vol. II, pp. 294-295.) The order was filed on the same day.

The third report of the Receiver was filed on November 30, 1920, covering the period from the end of his second account, October 31, 1919, to and including the 31st day of October, 1920. (This Record, Vol. II, pp. 296-311, inc.)

To this account defendants objected on the 4th day of December, 1920 (see Vol. II, pp. 312-313), the objections, however, conceding that the sum of \$5,000 to the Receiver and \$5,000 to the attorney were reasonable sums.

This account and the allowance of the compensation of himself and his attorney was confirmed by

the lower Court on the 4th day of December, 1920. (Vol. II, pp. 314-315.)

The exceptions of defendants (see Exceptions XII to XV, Inc., this record, Vol. II, at pp. 526-528 Inc.; Appellants' Opening Brief, pp. 6-8, Inc.) cover payments made by the Receiver in all four accounts, aggregating \$57,730.06, and covering the following items:

To F. C. Handy.....	\$17,400.00
To bookkeeper.....	4,213.33
For Court fees.....	70.00
For premium on bond.....	200.00
For traveling expenses.....	1,125.81
To Haskins & Sells.....	3,679.40
To Master in Chancery.....	2,500.00
To Receiver.....	14,270.76
To attorney for receiver.....	14,270.76

except that in the last exception (No. XV) counsel does not appear to have included the sum of \$2,262.34 paid each to the Receiver and to his attorney, but see Exception X, and also Court's order on page 517, Vol. II, this Record, where, on motion of defendants (appellants), with reserved objections, the Receiver was authorized to retain \$5,000, in order to satisfy balance of commissions, etc., hence the Court ordered a division of the balance between the Receiver and his attorney.

The F. C. Handy mentioned as having received \$17,400 was the representative of the Receiver, at Shafter, Texas, and acted as superintendent and manager of the mine, in connection with E. M. Gleim, the superintendent of the defendant company, until about the first of December, 1918, and

subsequently alone until the Receiver's discharge by delivery of all of the property back to the company. The payment to Mr. Handy of the sum of \$450 per month (the salary of the then superintendent of defendant) was consented to by the parties to the action, as appears from the correspondence mentioned in the affidavit of the Receiver made on the 5th day of August, 1921, and filed on that day (see Vol. II of this Record, commencing at p. 493), wherein it appears that after the attorney for the Receiver had made a full report to the attorneys for the respective parties concerning the qualifications and ability of Mr. Handy to satisfactorily fill the position mentioned, stating the amount of salary to be paid,—that is to say, \$450 per month—both the attorneys for the complainants and the attorneys for the defendants replied by letter to the effect that there was no objection to paying Mr. Handy the sum of \$450 monthly as salary, the attorney for complainants stating that he consented thereto for and on behalf of complainants, and the attorneys for defendants stating the same thing on behalf of defendants. (See both letters, in full on pp. 494, 495.)

The above amount of \$4,213.33 was the amount in full paid to the bookkeeper employed by the Receiver to keep the books of the office, it being apparent from the reports of the Receiver that a bookkeeper was a necessity. This in part also resulted from a stipulation of all the parties, which is set out at page 499. This stipulation, it is true, on its face only applied to John W. F. Peat, who

was one of the defendants in the action and was a former secretary of the company (see p. 499), but who afterwards, becoming sick, resigned, and the Receiver appointed a successor, and on the resignation of that bookkeeper appointed another, who maintained the office until the office was turned over to the company (p. 497).

The item \$1,125.81 covered the travelling expenses of the Receiver, his attorney and Mr. Handy on two trips to the property at Shafter, Texas, the first to take possession of the property and the second on a visit to look the property over, \$579.25 of which was reported in the first account of the Receiver filed on the 2d day of November, 1918, and \$546.56 of which was reported in the second report and account of the Receiver filed on the 10th day of December, 1919. (See Exceptions XII and XIII, pp. 6 and 7 of Defendants' Opening Brief.)

The item \$3,679.40 paid to Haskins & Sells was the sum of \$3,174.40 paid out under the order of the Court to Haskins & Sells during the year 1919 and allowed in the second account of the Receiver (see Vol. I, p. 281) and \$630 expended; \$505 in November, 1919, and \$125 in September, 1920.

These audits were made each year by the Receiver for the purpose of seeing that the accounts were kept correctly and as preparatory to the Income Tax Statements, and included the preparation of those statements. The larger amount of \$3,174.40 was in consequence of the audit made under the order made by the lower Court on January 13th,

1919, which order was consented to by all parties. (This Record, Vol. I, p. 181.)

The item of \$2,500 was paid to the Master in Chancery in 1918 as fee of the Master allowed by the lower Court, and was also confirmed by the order of confirmation of the second report of the Receiver. The item is found on page 281.

The balance consists of two items of \$14,270.76 each, paid to the Receiver and his Attorney, as follows:

\$4,270.76 to the Receiver and his attorney for the year 1918, and allowed by the stipulation and order of December 11, 1918. (This Record, Vol. I, pp. 262-264, inc.)

\$5,000 paid to each and allowed in the order confirming Second Report and Account. (This Record, Vol. II, pp. 294, 295.)

\$5,000 paid to each and allowed in the order confirming Third Report and Account. (This Record, Vol. II, pp. 314, 315.)

And a balance of \$2,262.34 to each, not included in the above, allowed in the order confirming the Fourth Account. (This Record, pp. 504-506.)

It is apparent that at all times the Receiver was properly diligent in annually accounting for every payment made by him, either to others in regular course, or to himself and his attorney, and that in the case of payments to himself and his attorney and in all other payments that were in any sense out of the due course of the business of the company to have the amounts allowed and ordered paid by the Court.

It further appears that all of the amounts paid to F. C. Handy, the Receiver's representative at Shafter, were consented to by the parties. In a sense the amount paid to the bookkeeper was consented to. The order for the appointment of Haskins & Sells was consented to. This makes a total of \$25,292.40 of the payments excepted to, which were consented to by the parties.

The consent to the payments would eliminate from Exception XV (Appellants' Opening Brief, p. 8) covering the objections to the Fourth Account filed on the 27th day of May, 1921, the item of \$2,100 paid to Mr. Handy, and the \$500 paid to the Receiver's bookkeeper, leaving only as to that account the sum of \$50 for the premium on the Receiver's bond excepted to, and the two sums of \$2,262.34 subsequently paid each to the Receiver and his attorney, so that all other sums expended by the Receiver and objected to and excepted to are covered by the orders of confirmation and allowance for the years 1918, 1919, and 1920, none of which orders were appealed from, and it is contended that whatever these orders may be as between the parties, based upon the stipulations of the parties or the objections and exceptions made as between them during those years, that as between the Receiver and each of the parties the order of confirmation and the allowance in each instance was a final appealable order as to each item allowed.

At the argument counsel for appellants cited the case of *Heinze vs. Butte etc. Co.*, 129 Fed. 337,

which was decided by this Court in 1904, and the Court under the facts in that case holds that neither an order of the Circuit Court approving monthly reports of a receiver, nor one directing him to pay expenses incurred by him made before the coming in of his final account is a final order, and the appeals were dismissed.

But see the later case of *Ruggles vs. Patton*, 143 Fed. 312, which case is identical with the case at bar, and the Receiver was a party to the appeal.

It will be noticed that the order there was that the Receiver should pay himself the sum of \$20,000 for the year 1904, and the Court say:

“That this order applied to the Court’s receiver is no test of its finality. If the receiver presents any particular matter touching his action for the Court’s approval and the Court upon a proper hearing decides in favor of the receiver and approves his conduct, or discharges him from liability in respect of the particular matter, would it be said that the matter would remain open and subject to reconsideration upon the application of anyone interested, * * * simply because the receivership was not then terminated? The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to whether the receivership was thereafter continued, but in the nature and character of the order itself.

When Mr. Patton was ordered to pay to himself out of the funds in his hands as custodian of the Court the sum of \$20,000 for the services for 1904, that sum of money was just as absolutely withdrawn from the custody of the Court as if he had been ordered to pay it to a third person."

"The fact that he was then the Court's receiver and that he continued to be the Court's receiver gave the Court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect, than it could exercise over any other party obtaining funds through the order of the Court."

Also see the case of *Pennsylvania Co. vs. Philadelphia*, 266 Fed. 1 (1920). This was a receivership case, in which the Philadelphia Company petitioned the Court to reimburse it for moneys it had advanced. The petition was resisted by the Receiver and other parties. The Court, however, granted the petition and ordered a certain amount of the money paid to the Philadelphia Company. From this order the appeal was taken and a motion was made to dismiss it on the ground that it was not final.

The Court (bottom of p. 4) say:

"In denying this motion, it is sufficient to say, very briefly, that the order appealed from directs the payment of the fund to one determined to be entitled to it. It is both a disposition of the fund and a determination of the rights

of everyone claiming it. On performance, the money would pass beyond the control of the Court forever. As nothing remains to be done, except to pay over the money, it is a final determination of the particular matter, and is, therefore, a final decree and appealable although the receivership, having to do with innumerable unrelated matters, shall still continue. *Ruggles vs. Patton*, 143 Fed. 312, 74 C. C. A. 450; *Trustees vs. Greenough*, 105 U. S. 527, 26 L. Ed. 1157."

The Court further say (top of p. 5) that—

"The appellants' right of appeal depends upon their interest in the fund * * * . The appellants' claimed interest in the fund was there in collision with the appellees, claimed right to the fund."

The latter statement by the Court is applicable here. As between the Receiver and the Presidio Mining Company it was perfectly apparent at the time of each order that the Receiver was directed to pay himself and his attorney these separate sums out of the fund (see this Record, Vol. I, p. 263; Vol. II, p. 295 and p. 315), and thereby the money was in each instance separated from the fund and the interest of the Receiver and his attorney in collision with the interest of the appellants, and as said in the case of *Ruggles vs. Patton* the Court has no authority to call back the fund. It would indeed be a harsh rule if a receiver paying out money to others and to himself under order of Court, in a case where the good faith of the payment or its reasonableness

was not in question, could long after payments had been made and after the time to appeal from the orders had passed, be compelled on the appeal from the final account—only final because it was last—to pay back the money merely because the Court still retained jurisdiction of the receiver, and could be urged to coerce him to perform the act through the Court's power to refuse to confirm his last account, which last account was not connected in any manner with the three previous accounts.

Each account was a distinct and separate case, so to speak; and the Court will notice that the so-called final account of the Receiver merely accounts from the end of the fiscal period of the last account,—that is to say, October 31st, 1920, to its date (see this Record, Vol. II, p. 326), and the order of approval of the Court appealed from did not purpose to apply to the previous accounts. See order appealed from (Vol. II, p. 504), where the order recites that “said Receiver having filed herein his final report and account of his administration covering the period from October 31st, 1920, to and including,” etc., which was exactly what the Receiver was ordered to do *on motion of appellants' counsel* (This Record, Vol. II, pp. 356–358), which order commands (bottom of p. 357) the Receiver to “file herein a report and account of his receivership *since his last report and account*,” etc.

The above case of Ruggles vs. Patton is also approved in the case of Bankers Trust Company vs. Missouri etc. Ry. Co., 251 Fed. 789, which was a receivership, and an administrative order was held

to be a final order, the Court (bottom of p. 796) saying:

“The compensation of receivers is usually fixed by administrative orders, and those orders are reviewable by the Appellate Court generally as interlocutory, but sometimes as final orders.”

The reasoning of the Court in the last case following the above excerpt would lend support to the intimation in the opinion in the Heinze case, commencing on p. 339 (129 Fed.), that whenever the orders approving receiver's accounts are held to be interlocutory, they are subject to review on appeal from the final decree disposing of the entire case, but that would not help appellants on this appeal, because such a final decree is yet to be entered.

It will be noted that in the stipulation to the first account (This Record, Vol. I, p. 262) the reason for a yearly account and the allowance of the items of expenditure is apparent because it is recited in the stipulation that the Receiver has asked the Court for an allowance to himself and his attorney covering the year 1918, in order that the expenses of the receivership may be treated as deductions from the net income of such receivership during this fiscal year. Therefore, upon the allowance of this expense it would assist in fixing the net income of the Presidio Mining Company for taxation purposes under the Income Tax Law, so that it was material to have it fixed yearly.

In conclusion, it may not be out of place to state that the total of money handled; the character and amount of other property; the fact that it was

mining property of large value situated at a long distance from the Court; the consequent burden of responsibility that was necessarily placed upon the Receiver; the admirable and exact manner in which the trust was fulfilled; the large amount of time that was necessarily taken in its administration; and the reasonable sum of the fees charged, certainly suggest that the Receiver is entitled to the utmost consideration by the parties to this action; especially when it is remembered that the Receiver did not seek the position; that the lower court merely announced the appointment of a receiver but not of this Receiver, and that this Receiver was the selection, on their own motion, of the parties to the action.

It is respectfully submitted that on the whole case, so far as the Receiver is concerned, the order of the lower Court appealed from should be affirmed.

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Attorney for Receiver. *ps.*

